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IN THE

Supreme Court of the United States

October Term, 1960

No. 16

NATIONAL COAL ASSOCIATION, UNITED MINE WORKERS OF AMERICA, FUELS RESEARCH COUNCIL, INC.,
Petitioners

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., THE CITY OF NEW YORK

BRIEF FOR PETITIONERS

National Coal Association, United Mine Workers of America, Fuels Research Council, Inc.

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Summary of Argument	9
Argument	12
I. End Use Conservation Is A Material Consideration In The Issuance Of A Certificate Of Public Convenience And Necessity	12
A. The Legislative History of the Act	12
B. The Development of the Commission's Conservation Policy on Boiler Fuel Use	25
C. The Courts' Interpretation of the Commission's Authority to Consider End Use in Certificate Proceedings	30
II. The Court Below Has Arbitrarily Restricted The Commission's Authority To Evaluate The Proposed Transportation Service In Terms Of The Public Convenience And Necessity	32
III. The Decision Of The Court Below Impairs The Position Of Competing Fuel And Transportation Interests	42
Conclusion	46
Appendix	47

CITATIONS

COURT CASES: Page

American Airlines, Inc. v. C.A.B., 192 F. 2d 417 (CADC, 1951) 38
Atlantic Refining Co. v. Public Serv. Commission, 360 U.S. 378 (1959) 10, 34, 42
Boehm v. Commissioner, 326 U.S. 287 (1945) 29
Chapman v. FPC, 345 U.S. 153 (1953) 34
Charleston & W. C. Ry. v. FPC, 234 F. 2d 62 (CADC, 1956) 30, 31, 43n; 46
City of Pittsburgh v. FPC, 237 F. 2d 741 (CADC, 1956) 38
Colorado v. U. S., 271 U.S. 153 (1926) 36
Department of Conservation v. FPC, 148 F. 2d 746 (CA 5, 1945), cert. den. 326 U.S. 717 (1945) 31
Dixie Carriers, Inc. v. U. S., 351 U.S. 56 (1956) 37
Florida Economic Advisory Council v. FPC, 251 F. 2d 643 (CADC, 1957) 39
FPC v. East Ohio Gas Co., 338 U.S. 464 (1950) 9, 15n, 19, 20, 32
FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944) 9, 15n, 17, 18, 19, 33n, 34n
ICC v. Parker, 326 U.S. 60 (1945) 11, 36, 37
ICC v. Railway Labor Executives Assn., 315 U.S. 373 (1942) 11, 35
Kentucky Natural Gas Corp. v. FPC, 159 F. 2d 215 (CA 6, 1947) 45
Lynchburg Gas Co. v. FPC, 275 F. 2d 847 (CA 3, 1960) 31n
Michigan Consolidated Gas Co. v. FPC, 246 F. 2d 904 (CA 3, 1957), cert. den. 355 U.S. 894 (1957) 19n, 45
National Broadcasting Co., Inc. v. U. S., 319 U.S. 190 (1943) 38
National Coal Assn. v. FPC, 191 F. 2d 462 (CADC, 1951) 31, 33, 34
National Coal Assn. v. FPC, 247 F. 2d 86 (CADC, 1957) 28n
Norfolk Southern Bus Corp. v. U. S., 96 F. Supp. 756 (E.D. Va., 1950), aff'd. per curiam 340 U.S. 802 (1950) 45
Panhandle Eastern Pipe Line Company v. FPC, 232 F. 2d 467 (CA 3, 1956), cert. den. 352 U.S. 891 (1956) 29, 32

Page

Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, 332 U.S. 507 (1947) 32
Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954) 38n
P.U.C. of Conn. v. FPC, 205 F. 2d 116 (CA 3, 1953) 45
Schaffer Transportation Co. v. U. S., 355 U.S. 83 (1957) 37
Transit Commission v. U. S., 284 U.S. 360 (1932) ..35, 36
U. S. v. Detroit & Cleveland Navigation Co., 326 U.S. 236 (1945) 11, 38, 42, 45
U. S. v. Pierce Auto Lines, 327 U.S. 515 (1946) 45

FPC Cases:

East Tennessee Natural Gas Co., 8 FPC 836 (1949).. 28n
El Paso Natural Gas Co., 22 FPC 900 (1959) 29n
Hope Natural Gas Co., 4 FPC 59 (1944) 19n
Houston Texas Gas & Oil Corp., 16 FPC 118 (1956).. 28n
Iroquois Gas Corp., Docket No. G-2310, et al, Op. No. 279, Issued December 28, 1954 ..... 26n
Kansas Pipe Line & Gas Co., 2 FPC 29 (1939)..... 15
Mississippi River Fuel Corp., 12 FPC 109 (1953) ..26, 27
Mississippi River Fuel Corp., 12 FPC 114 (1953) .. 25n
Northern Natural Gas Co., 4 FPC 1099 (1945) 28n
Northern Natural Gas Co., 15 FPC 1634 (1956) 28n
Panhandle Eastern Pipe Line Co., Docket No. G-2035, et al, Op. No. 274, Issued July 28, 1954 ..... 28n
Peoples Gulf Coast Natural Gas Pipeline Co., Docket No. G-19086, et al, Amending Order Issued July 29, 1960 ..... 41n
Piedmont Natural Gas Corp., 9 FPC 70 (1950) 28n
Piedmont Natural Gas Corp., 9 FPC 629 (1950) ... 28n
Southern Natural Gas Co., 14 FPC 243 (1955) 28n
Southern Natural Gas Co., 22 FPC 211 (1959) 29n
Texas Eastern Transmission Corp., Docket No. G-2340, et al, Findings and Order Issued April 29, 1954 ..... 29n
Texas Gas Transmission Corp., 10 FPC 391 (1951).. 28n
Texas Gas Transmission Corp., 12 FPC 658 (1953).. 28n
Trans-Continental Gas Pipe Line Company, Inc., 7 FPC 24 (1948) 29n, 41n
Transcontinental Gas Pipe Line Corp., 9 FPC 32 (1950) 29n

Page

Transcontinental Gas Pipe Line Corp., 11 FPC 605 (1952) 27n
Transcontinental Gas Pipe Line Corp., 14 FPC 1 (1955) 26n
Transcontinental Gas Pipe Line Corp., 20 FPC 843 (1958) 39
Transcontinental Gas Pipe Line Corp., 21 FPC 839 (1959) 29n
Transcontinental Gas Pipe Line Corp., Docket No. G-20107, et al, Order Remanding Applications Issued August 26, 1960 ..... 41n, 42n
United Gas Pipe Line Co., 21 FPC 64 (1959) 29n

STATUTES:

Natural Gas Act:

52 Stat. 821, as amended, 15 U.S.C. 717-717(w) ..2, 12

Sec. 1(a) 13
Sec. 7(c) 16n, 17
Sec. 7(e) 2, 3, 16n, 32, 33
Sec. 19(b) 2

Interstate Commerce Act:

24 Stat. 379, as amended, 49 U.S.C. § 1-27 34
Sec. 1(18) 35n
49 Stat. 551, as amended, 49 U.S.C. § 306 ..... 36n
49 Stat. 551, 49 U.S.C. § 307 ..... 36n
54 Stat. 941, 49 U.S.C. § 909 ..... 37n

MISCELLANEOUS:

Consolidated Edison Company of New York, Inc., FPC Report Form No. 1, 1959 ..... 4n
Federal Power Commission, Form No. 4, Monthly Fuel Consumption Reports for 1959 ..... 44n
Federal Power Commission Report to Congress, "The First Five Years Under The Natural Gas Act", transmitted January, 1944 ..... 20, 21n
Federal Power Commission Report to Senate Committee on Interstate Commerce on S. J. Res. 92, transmitted April, 1944 22
Federal Power Commission, Twentieth Annual Report to Congress (1940) 15, 16, 25

Page

Federal Trade Commission, Final Report to the Senate of the United States, Sen. Doc. 92, 70th Cong., 1st Sess., Part 84-A (1936) 13, 14
Hearings, Subcommittee of House Interstate and Foreign Commerce Committee on H.R. 79, H.R. 1758 and H.R. 982, 81st Cong., 1st Sess. (1949) .. 24n
Hearings, Senate Committee on Interstate Commerce on S. 734 and S. 1028, 80th Cong., 1st Sess. (1947) 24n
H. Rep. No. 1290, 77th Cong., 1st Sess. (1941) on H.R. 5249 ..... 16, 17, 44
Natural Gas Investigation, Docket No. G-580, 4 FPC 725 (1944) 23
Olds-Draper Report, FPC Docket No. G-580, transmitted to Congress April 28, 1948 23
S. Rep. No. 948, 77th Cong., 2d Sess. (1942) on H.R. 5249 ..... 17, 44
S. Rep. No. 1234, 78th Cong., 2d Sess. (1944) on S. J. Res. 92, as amended 22n, 23n
S. J. Res. 92, 78th Cong., 2d Sess. (1944) 22n
S. Res. No. 83, 70th Cong., 1st Sess. (1928) 13n
Smith-Wimberly Report, FPC Docket No. G-580, transmitted to Congress April 28, 1948 ..... 23, 26
U. S. Bureau of Mines, Minerals Yearbook (1947) 43n, 44n
U. S. Bureau of Mines, Minerals Yearbook, Vol. 2 (1952) 43n
U. S. Bureau of Mines, Weekly Coal Report No. 2216 ..... 43n

IN THE

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No. 46

NATIONAL COAL ASSOCIATION, UNITED MINE WORKERS OF AMERICA, FUELS RESEARCH COUNCIL, INC.,
Petitioners

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
THE CITY OF NEW YORK

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR NATIONAL COAL ASSOCIATION, UNITED MINE WORKERS OF AMERICA, FUELS RESEARCH COUNCIL, INC.

OPINIONS BELOW

The orders of the Federal Power Commission denying the certificate application (R. 174a-183a) and denying rehearing (R. 184a-194a) are reported at 21 FPC 138 and 21 FPC 399. The opinion of the Court of Appeals for the Third Circuit setting aside the Commission's order (R. 308-324) is reported at 271 F. 2d 942.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1959 (R. 325). The petition for a writ of certiorari was filed on February 29, 1960, and granted on April 18, 1960 (R. 330), 362 U.S. 948. The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission in the exercise of its certificate power under the Natural Gas Act can consider the end use of the gas in a proposed interstate transportation service as affecting "the present or future public convenience and necessity";

2. Whether in such a proceeding the Commission can give weight to various other policy considerations, including the effect of non-jurisdictional sales upon interstate gas prices and availability of gas supplies to the consuming public?

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. 717, et seq., are set forth *infra* at pp. 47-51. Immediately involved is Section 7(c), 56 Stat. 84 (1942), 15 U.S.C. 717f(c), which reads:

> Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing

properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

STATEMENT

Consolidated Edison Company of New York, Inc. (Con Edison), a large utility which distributes gas, electricity and steam in metropolitan New York, entered into gas purchase contracts with various producers in the Sejita and Normanna gas fields in Texas (R. 165a). Under these contracts the gas was expressly restricted to use as boiler fuel and could not be resold to consumers (R. 6a, 29a, 30a, 108a). The arrangement was admittedly motivated by the producers' desire to avoid regulation by the Federal Power Commission (R. 108a).

Con Edison then made an agreement with Transcontinental Gas Pipe Line Corporation (Transco) for the transportation of up to 50,000 Mcf of this gas per day from Texas to New York City; this arrangement became known as the "X-20" service. The gas was to be used to fire two of the ten boilers in Con Edison's Waterside plant on a firm basis and six of the other boilers on an interruptible basis, displacing large tonnages of coal now used at that plant (R. 10a, 17a,

105a).[1] The X-20 service also included a commitment by Transco to deliver to Con Edison upon request up to 50,000 Mcf of gas per day out of Transco's own reserves for a period not to exceed 60 days in any year. This interruptible supply was unrestricted as to end use (R. 5a-6a, 31a).[2]

The X-20 proposal was a part of Transco's application for a certificate of public convenience and necessity under Section 7(c) of the Natural Gas Act, covering a major expansion of its existing pipeline system, and requesting authority to develop and operate jointly, with Texas Eastern Transmission Corporation and New York State Natural Gas Corporation two depleted oil and gas fields in Pennsylvania, the Leidy

[1] In 1959, Con Edison used 988,000 tons of coal and 10,437,000 Mcf of gas at Waterside and 1,495,000 tons of coal and a relatively insignificant amount of gas at the East River plant, which was to be converted to gas in a later phase of this program (R. 24a, 32a). Con Edison's FPC Report Form No. 1, 1959, pp. 86-1, 87-2.

[2] Transco's CD-3 rate under which Con Edison presently purchases its gas contains the following limiting provision:

> "(b) Deliveries of gas to be used or resold for boiler fuel may be curtailed by Seller on an equitable basis when such gas is, in Seller's opinion, required by Seller for use in its underground storage facilities; provided, however, that the consumption of natural gas for boiler fuel in amounts up to 500 Mcf per day by any consumer shall be exempt from such curtailment and no such curtailment shall be made which will cause Buyer to receive less than 65 per cent of the maximum quantities of gas Buyer is entitled to purchase under this rate schedule, based upon the contract demands during the current year." (R. 154a-155a.)

The X-20 proposal would permit Con Edison alone of Transco's resale customers to circumvent this limitation. Should the Third Circuit's ruling be upheld, the legality of this provision, which the Commission has hitherto found to be in the public interest, would be subject to serious question.

and Tamarack fields, as underground gas storage reservoirs.[1] Transco's application for the X-20 service is only the first phase in Con Edison's much broader program to convert entirely two of its electric generating stations from coal to natural gas, which ultimately contemplates a daily volume of 120,000 Mcf of gas to be transported to New York City by Transco for boiler fuel use in Con Edison's Waterside and East River stations (R. 5a, 7a, 16a-17a, 24a).

Con Edison and The City of New York intervened in support of the application, and National Coal Association, United Mine Workers of America and Fuels Research Council, Inc. intervened in opposition to it.

Although all of the respondents now assert that the proposed end use of the gas is no proper concern of the Commission,[2] at the certificate hearing Con Edison attempted to show that the X-20 service was in the public interest because this use of gas would contribute

[1] The expansion application was assigned Docket No. G-13590 and the joint application of Transco, Texas Eastern Transmission Corporation and New York State Natural Gas Corporation relative to the Leidy and Tamarack fields was assigned Docket No. G-13793. Both applications were consolidated for hearing.

[2] At the outset of the hearings, counsel for Con Edison apparently harbored no doubts as to the Commission's authority to consider end use, stating:

> "We also recognize that it involves the use of that portion of the gas as boiler fuel and if as we will point out through our witnesses, whatever the questions that may normally be raised with respect to conservation views, the views of the coal interests, that we have a unique problem in New York City with respect to smoke control or air pollution, so that we are laying right before Your Honor at this moment the problem which may be controversial and which we will meet by our testimony." (R. 4a)

See also the testimony of the witness Manz (R. 21a-23a).

to the reduction of air pollution in the vicinity of its Waterside station by eliminating the use of coal altogether in two of the boilers, which produced only 2 per cent of the overall system electrical load (R. 15a-16a, 81a, 88a-89a). The alleged air pollution was traceable to only these two boilers of the eight operated by Con Edison at one of its Waterside plants, and the other Waterside plant was to remain entirely on coal (R. 23a-24a). The stack emissions at Waterside were within the permissible limits for plants of this size under the rules and regulations of the Department of Air Pollution Control of the City of New York (R. 93a-96a), and respondents failed to prove that the alleged air pollution problem could not feasibly be controlled by means other than conversion to gas under the X-20 proposal. Although substantial volumes of gas have been available during off-peak periods since 1951, and used in other stations in Con Edison's integrated electric system, no attempt was made to use that gas at Waterside.[5]

The Presiding Examiner concluded that Transco and Con Edison had "not sustained their burden of establishing that this service is required by the public

[5] Under normal pipeline and distributor operations the peak loads occur during the winter months when the space heating demands of customers are at their greatest. During the off-peak periods of the year when space heating requirements are at a minimum, substantial volumes of excess, or "valley," gas are usually available. During 1957, Con Edison had valley gas available in varying amounts from February through December (R. 153a). The company burned a total of 28,669,000 Mcf of natural gas in five of its stations (R. 74a), and the Hell Gate Station alone consumed a daily average of 49,000 Mcf, far more than the 25,000 Mcf now sought on a firm basis for boilers Nos. 71 and 72 (R. 91a).

convenience and necessity" (R. 164a, 172a). However, since he believed that the Commission was precluded by the Act from considering "the public interest aspect of the end use [of the gas]," he approved the requested transportation service (R. 171a).

The Commission reversed the Presiding Examiner, and denied the certificate. Although it appreciated the professed advantage of gas in alleviating air pollution in Manhattan near the United Nations buildings, it held that other policy considerations compelled the denial of the certificate. These factors, together with the proposed inferior end use of the gas, tipped the balance of the public interest against the application. In denying the petition for a rehearing, the Commission summarized the adverse policy considerations as:

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[6] The Presiding Examiner's comments on the respondents' evidence are significant:

> "*If* the smoke from Waterside No. 2 were provably injurious to life or health or *if* the economic losses, (such as lowering of real estate values, high cleaning cost for buildings) were outstanding; *if* the city's health officials were legally powerless to act on a matter they had determined to be dangerous, *if* it was not possible for Consolidated Edison to shift load to other stations and close down these boilers, then we could say without doubt that this proposal would be in the public interest and required by the public convenience and necessity. As a matter of fact, if all these *ifs* were established by the record, the use of this gas for boiler fuel would be markedly more necessary and valuable than for home space heating, cooking or water heating!
>
> "The record in this case does indicate that Consolidated Edison should do something about these annoying smokers—and whether that something in the absence of utilizing natural gas is to renovate the equipment, raise the stacks, or shift the load to some other plant is a matter for others to determine. The opportunity for discussion and speculation on this point is virtually limitless." (R. 172a-173a) (Emphasis supplied by the Presiding Examiner)

"the effect of stimulating increased purchases of gas in the field by distributing companies in substitution for the present, prevalent types of interstate natural-gas services involving purchases and resales by natural-gas pipeline companies; the effect of pre-empting pipeline capacities which would otherwise be available for more widely beneficial public service; the effect of making it more difficult to meet the requirements of smaller purchasers in the event arrangements of this type become wide-spread; and the effect of increasing the rates for gas, to the detriment of the consumer. We also considered the proposed inferior end use of the gas." (R. 185a)

The Court of Appeals set aside the Commission's order and held that by denying the certificate, the Commission exceeded its jurisdiction: in disapproving of the end use to be made of the gas for boiler fuel; in recognizing that the impact of demand by large utilities for this kind of firm contract service would increase gas prices and make pipeline purchases in the field more difficult; and in considering that such proposals would utilize facilities which would otherwise be available for more beneficial public needs. To give weight to such factors at all as elements of public convenience and necessity, said the court, was "an assertion of authority for general conservation" and would put a consideration into the Act which Congress did not intend (R. 322, 323).[7]

[7] Although the court said it should not interfere with the Commission's weighing of the factors on the use of gas as boiler fuel "if a rational conclusion has been reached," it implied that the Commission's "assumption" that such a use was "inferior" was not a rational conclusion because the gas-generated electricity and steam would also serve domestic users for heating and lighting (R. 323, 324).

This Court granted certiorari upon petition of the Commission in No. 45 and of these petitioners in No. 46, consolidating the cases for argument.

SUMMARY OF ARGUMENT

The fundamental reason for the decision of the court below was the court's belief that by examining and disapproving of the end use to be made of the gas in this proposed interstate transportation service, the Federal Power Commission exceeded its jurisdiction under the Natural Gas Act and attempted to assert "a general allocation and conservation authority over the natural gas fields of the United States" (R. 312). Far from this extravagant conception, all that the Commission did was weigh the end use of the gas with the other policy considerations that bore upon the public convenience and necessity and conclude that the proposal was not in the public interest. The effect of the court's decision is to deny to the Commission any power at all to consider the proposed use of the gas in a certificate proceeding under Section 7.

The legislative history of the Natural Gas Act shows that considerations of end use conservation are a proper part of the Commission's certification function. When the Act was amended in 1942, following a report of the Commission to Congress [1] which the grant of additional authority was recommended, the Commission's certificate powers were broadened to include all construction and extension of natural gas lines in interstate commerce, with the purpose of allowing the Commission to deal with conservation aspects of certificating these new facilities. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 616-617 (1944); *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, 468-469 (1950). Congressional

committees and the Commission itself in its reports to Congress have recognized the existence of this power in the Commission.

By laying unwarranted stress upon a statement out of context in one of the Commission's reports, the court below insisted that the Commission has conceded that it lacks this power. But the court disregarded the careful evolution by the Commission of an administrative policy on boiler fuel use of gas, which for many years has kept such use under careful restrictions, because gas as an exhaustible natural resource should be reserved for superior industrial and domestic uses.

The other Courts of Appeals which have reviewed this question have followed the principle that the Commission may take into account the end-use of the gas in determining whether a proposal is required by the public convenience and necessity. While asserting that it finds no fault with these decisions, the court below has established a new principle of law, shutting out end use considerations from the Commission's certificate jurisdiction.

Contrary to the teachings of this Court that administrative agencies, charged with determining the public convenience and necessity under statutes like the Natural Gas Act and the Interstate Commerce Act, must be given wide latitude in evaluating all of the factors bearing on the public interest, *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 391 (1959), the court below has virtually limited the Commission to passing upon the technical competence and feasibility of new gas construction and extensions, and if such conventional requirements are satisfied, the Commission's function is ended. This Court has made it clear that this kind of restrictive interpretation was never

contemplated by the Act, as is plain from its decisions under similar provisions in the Interstate Commerce Act. *ICC* v. *Parker*, 326 U.S. 60 (1945); *U.S.* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236 (1945); *ICC* v. *Railway Labor Executives Assn.*, 315 U.S. 373 (1942).

The decision in this case has seriously impaired the position of producers and transporters of competing fuels and their thousands of employees. Since the introduction of natural gas into coal marketing areas invariably results in displacement of coal, the Federal Power Commission's certificate proceedings have become the traditional arena for resolving the issue between these contending fuel interests. In reviewing certificate applications the Commission has frequently made the value judgment whether the proposed use of gas better serves the public interest than the existing fuel. By denying to the Commission any power at all to consider the use of the gas, the court below has vitiated this function of the Commission. With the accelerating encroachment of gas upon traditional coal markets in the postwar period, this new restriction upon the Commission's authority in certificate cases has virtually left these petitioners with no tribunal before which their interests may be defended.

What the court has really done is substituted its own notions on conservation policy for the judgment of the Commission by implying that the Commission's disapproval of the proposed use of this gas was not a "rational" judgment (R. 323-324). Thus invading the special administrative province of the Commission, the court has exceeded the limited scope of its appellate review, for it is the function of the Commission, not the court, to assay the conflicting policy considerations,

appraising all of their implications in the public interest, and determine whether a proposed service is required by the present and future public convenience and necessity. Its action here, consistent with its responsibilities under the Act, was within its legal competence and supported by substantial evidence.

For these reasons the judgment of the court below should be reversed and the order of the Commission affirmed.

ARGUMENT

I. END USE CONSERVATION IS A MATERIAL CONSIDERATION IN THE ISSUANCE OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

The history of the Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. § 717, *et. seq* (1958), the undisputed evolution by the Federal Power Commission of a conservation policy on boiler fuel use, and the courts' interpretation of the Commission's authority to consider end use in certificate proceedings demonstrate that end use conservation is a material consideration in the issuance of a certificate of public convenience and necessity under Section 7 of the Act.

A. The Legislative History of the Act.

By judiciously selecting those legislative materials which supported its thesis, the Court of Appeals concluded that Congress intended to deny to the Federal Power Commission any authority at all to consider the proposed end use of the gas in certification proceedings. Although the phrase "public convenience and necessity" itself implies no such limitation, the court below fashioned its restrictive interpretation largely out of what the court thought was a "concession" by the Commission of a "lack of such power" (R. 315-316).

A fair reading of the Act's history shows that the quality of natural gas as an exhaustible natural resource has been a significant factor in the formulation of legislative policy by the Congress.

The Natural Gas Act originated from a series of investigations by the Federal Trade Commission made pursuant to a Senate resolution adopted in the first session of the 70th Congress.[8] The introductory clause of Section 1(a) of the Act establishes this investigation as the source of the policy underlying the Act (53 Stat. 821 (1938), 15 U.S.C. § 717(a) (1958). While the Federal Trade Commission did not articulate the techniques for achieving controlled conservation, its final report to Congress which led to the enactment of the Act in 1938 concluded:

> "Conservation is the first problem that demands attention . . .
>
> "Such a valuable nonreplaceable natural resource of general countrywide use or need should, in the public interest, be conserved and utilized to the highest economic and social advantage.
>
> * * * * *
>
> "It should be borne in mind that the problems presented by the natural-gas industry, while being in some respects similar to those of the electric industry, have some fundamental differences, and, indeed, they are different from those in any other utility industry. Natural gas must be used practically as soon as produced. Therefore, the public concern is that it be produced only as needed, but that it be produced and delivered when needed, and then that it be used to the highest economic and

[8] S. Res. No 83, 70th Cong., 1st Sess. (1928), as extended under S. J. Res. 115, 73rd Cong., 2d Sess. (1934).

social advantage. There are no precise parallels in the utility fields for such a situation."[9]

Reviewing the range of gas usage from field wastage by flaring to domestic consumption by the householder, the "highest grade of service," *Id.* at pp. 125-126, the report contains significant references to the importance of conservation of this exhaustible natural resource.[10]

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[9] Federal Trade Commission, *Final Report to the Senate of the United States*, Sen. Doc. 92, 70th Cong., 1st Sess., Part 84-A (1936), pp. 608, 615.

[10] Sen. Doc. 92, 70th Cong., 1st Sess., Part 84-A, pp. 101-102 (1936):

> "The economic necessity for conservation of natural gas lies in the importance of preventing excessive waste of this limited and exhaustible natural resource, the exploitation of which is subject to the effects of selfish and short-sighted operations. The interest of the public consists in conserving gas for those uses for which it is especially adapted, and in conserving the gas energy in the ground as a means of increasing oil production.
>
> . . . . . .
>
> "The economic interests concerned are so numerous and so often in conflict that it is hopeless to expect the formulation or application of an effective plan for preventing waste by these interests unassisted by public authority.
>
> . . . . . .
>
> "The question of preferential interest in the use of gas involved in what constitutes wastage as distinguished from legal use, must be given attention. Closely allied is the subject of competition of natural gas with other fuels, particularly in industry, the extent to which it is practicable and desirable to restrict production and use to public-utility and domestic uses for which natural gas is particularly adapted, but which may furnish demand wholly inadequate to take production, especially in the flush production period of oil fields. The feasibility of restricting use of natural gas to such purposes in the light of the effect of low-load factors attainable for domestic and commercial use on the operating expenses and rates of natural-

As first enacted, the Natural Gas Act of 1938 did not achieve effective regulation. Because the jurisdiction of the Federal Power Commission under the original Section 7 to issue certificates authorizing construction of new pipelines was limited to only those markets "in which natural gas is already being served by another natural-gas company" (*Infra* p. 50), the Power Commission ruled in one of its earliest cases, that Congress did not intend it generally to "weigh the broad social and economic effects of the use of various fuels." *Kansas Pipe Line & Gas Co.*, 2 FPC 29, 57 (1939).

In its Twentieth Annual Report to Congress (1940)[11] the Commission recommended a broadening of the Act to give it authority to deal with such problems, stating:

> "* * * The Natural Gas Act and the work which the Commission is doing under it should be considered as a first step in dealing with the conservation of one of the country's exhaustible resources.
>
> * * * * *
>
> "Already, under this legislation, successful steps have been taken to reduce natural-gas rates. But the applications for authorization of new trans-

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gas utility companies, if they are denied the privilege of selling gas for industrial uses, must also be taken into consideration. Then, too, there are the interstate and intrastate features of the business and the fact that part of the interests involved are subject to public-utility regulation, while other parts are conducted as unregulated competitive ventures. As a whole, the question of conservation and prevention of waste of natural gas, therefore, involves an extremely complicated and difficult situation, any satisfactory solution of which requires impartial weighing of private rights and equities and public interest."

[11] This is the report which has been cited twice by this Court as the source of the Commission's recommendations on conservation policy which led to the broadening of its certificate powers in 1942. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 616-617 (1944); *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, 468-469 (1950).

mission pipe lines raise fundamental issues of conservation which cannot be settled in the public interest without a broadening of the Act.

* * * * *

"*Recommendations for Better Regulation of the Natural Gas Industry.*

"In order to make possible more effective protection of the public interest in connection with the transportation and sale of natural gas in interstate commerce, the Commission offers the following recommendations:

"1. Section 7(c) of the act should be broadened to give the Commission control over all new interstate natural-gas pipe-line construction through prohibiting the construction of any new lines utilized in interstate commerce until authorized by a certificate from the Commission. * * *" (*Id.* at pp. 9-10).[12]

To put into effect this recommendation amendments to the Act were proposed to Congress and after hearings before a Committee of the House the Bill (H.R. 5249, 77th Cong., 1st Sess.) was passed and on February 7, 1942, became law.[13]

The House Interstate and Foreign Commerce Committee, reporting favorably on the proposed amendments, concluded:

"By this legislation, the present jurisdictional disputes are eliminated, and the door is opened to the consideration by the Commission of the effect of construction and extensions upon the interest of

[12] Other recommendations were made but are not pertinent here.

[13] Significantly, Section 7(c) was added to the Act by the 1942 amendment, thus implementing the broader powers entrusted to the Commission by the enlargement of its jurisdiction under Section 7(c).

> producers of competing fuels and competitive transportation interests." (H. Rep. No. 1290, 77th Cong., 1st Sess., p. 3, October 21, 1941)."

The Report of the Senate Commerce Committee,[11] noting that the Commission had held under the old Section 7 that the views or interests of competing fuel companies could not be considered, went on to state:

> ". . . the possibilities of waste, uneconomic and uncontrolled extensions are multiple and tremendous. The present bill [H.R. 5249] would correct this glaring inadequacy of the act. It would also authorize the Commission to examine costs, finances, necessity, feasibility, and adequacy of proposed services. * * * Obviously these are powers that Federal Power Commission should have and should exercise in the public interest."

The hearings and the reports of the House and Senate committees show that by extending the Commission's jurisdiction under Section 7(c) to all construction and extension of natural gas lines in interstate commerce, Congress intended the Commission to consider the broad social and economic aspects of the interstate transportation of natural gas and the sale of gas for resale in interstate commerce. End use considerations and the impact upon competitive fuel interests are an essential element in this.

This Court was quick to perceive this broadening of the Commission's authority and in one of the first gas cases decided after the 1942 amendment, *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944), stated (at pp. 616-617):

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[11] S. Rep. No. 948, 77th Cong., 2d Sess. (1942), pp. 1-2

"The Act of February 7, 1942, by broadening § 7 gave the Commission some additional authority to deal with the conservation aspects of the problem."

The Court added this significant footnote (at p. 617):

"'The Commission has been alert to the problems of conservation in its administration of the Act. It has indeed suggested that it might be wise to restrict the use of natural gas 'by functions rather than by areas.' Annual Report (1940) p. 79.

"The Commission stated in that connection that natural gas was particularly adapted to certain industrial uses. But it added that the general use of such gas 'under boilers for the production of steam' is 'under most circumstances of very questionable social economy.' Ibid".

But since this was a rate matter and not a certificate case under Section 7, the majority of the Court held that while the Commission was "given broad powers of regulation" under Section 7 as amended, conservation was not an element for it to consider in the establishment of just and reasonable rates under Sections 4 and 5 of the Act.[13] The Court noted, however, that:

"When it comes to cases of abandonment or of extensions of facilities or service, we may assume that, apart from the express exemptions contained in § 7, considerations of conservation are material to the issuance of certificates of public

[13] Justices Frankfurter and Jackson, dissenting, would have required the Commission to utilize its rate-making power to foster superior uses of natural gas because of the importance of conserving this limited natural resource. 320 U.S. at pp. 626, 627, 639, 657-659.

convenience and necessity." *Id.* at p. 612 (Court's footnote omitted).[16]

In the instant case the court below paid no heed to these declarations of the scope of the Commission's authority in certificate cases and completely ignored this Court's decision in *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464 (1950);[17] where the Court again referred to the fact that the 1942 amendment gave broader certificate powers to the Commission, following the Commission's 1940 report to Congress which emphasized conservation as a proper element for its consideration. The Court forcefully pointed to this primary objective of the 1942 amendment, stating (at pp. 468-469):

> "Moreover, the initial interest of Congress in regulation of transportation facilities was reemphasized in 1942 by passage of an amendment to § 7(c)

[16] Relying on the *Hope* Decision, the Commission shortly thereafter ruled in a certificate proceeding under Section 7 of the Act (also involving Hope Natural Gas Co.): "That considerations of conservation are material to the issuance of certificates of public convenience and necessity under Section 7 of the Natural Gas Act is not open to question[13]

> "[13] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 88 L. Ed. 276, 288 (decided January 3, 1944)." 4 FPC 59, 66 (1944).

[17] The court below was apparently oblivious also of its own ruling in *Michigan Consolidated Gas Company* v. *FPC*, 246 F. 2d 904 (3rd Cir. 1957), *cert. denied*, 355 U.S. 894 (1957), in which it affirmed an order of the Commission authorizing a pipeline company to export natural gas to Canada. Quoting from the Commission's order which found, among other things, that "'There is no boiler fuel use proposed by Panhandle, and thus we are not approving a type of use for export which we do not favor for domestic purposes'," the court went on to say, "These findings are supported by substantial evidence and the conclusions thus stated *are clearly within the special competence of the Commission*." (Emphasis supplied) *Id.* at p. 912.

> of the Act broadening the Commission's powers over the construction or extension of pipe lines. 56 Stat. 83. This amendment followed a report of the Commission to Congress pointing out that without amendment the Act vested the Commission with inadequate power to make 'any serious effort to control the unplanned construction of natural gas pipe lines with a view to conserving one of the country's valuable but exhaustible energy resources'." (Court's footnote omitted)[18]

In developing its version of the legislative history of the Natural Gas Act, the court below insisted that "even more important" than the Congressional committee hearings and reports was "the Commission's own concession of lack of . . . power" to take into account considerations of end use conservation, which the court purported to find in the Commission's 1944 report to Congress (R. 315-316).

In relying on this imagined "concession," the court thrust aside the Commission's long-established practice of giving weight to end use considerations in certificate cases, ignored the context of the so-called "concession", and gave no weight whatever to later statements of the Commission to Congress which clearly reflect the Commission's conscious and continuing exercise of its certificate power to consider end use factors.

The portion of the Commission's 1944 Report in which the court below found this "concession" is not a concession at all. When read in context with its explanatory footnote (which was omitted by the

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[18] Congress later amended the Act to exempt wholly intrastate transportation and sale of gas, 68 Stat. 36 (1954), 15 U.S.C. § 717 (c) (1958), but this amendment in no way impinged upon the conservation aspects of the Commission's certificate jurisdiction.

court),[10] it is quite clear that the limitations which the Commission recognized were upon its powers to regulate rates for the direct sales of natural gas to industry and to suspend rates for resale industrial sales. Because of the absence of *these* powers, it, of course, did not have "comprehensive powers" to deal with the uses of natural gas.

To say, as the Commission did in January, 1944, that its power to deal with end uses of natural gas is not "complete and comprehensive" is not to say, as the court below would have it, that the Commission con-

[10] The footnote which the court omitted reads as follows:

"14 In its Opinion No. 93-A, which accompanied its order of September 24, 1943, issuing a certificate of public convenience and necessity to Tennessee Gas & Transmission Co. for the construction and operation of a natural-gas pipeline from Texas to West Virginia, the commission stated:

'Interveners representing coal operators, labor unions, and railroads, having a vital stake in the coal industry in the Appalachian area, oppose the granting of a certificate for the construction of applicant's proposed natural-gas pipe line principally on the ground that the present and future fuel needs of that area can be adequately met by coal. It is contended that the use of natural gas for industrial and space-heating purposes constitutes a dissipation of the natural-gas resources, and threatens the coal industry with ruinous competition. Considerable evidence was adduced by these interveners for the purpose of supporting such contentions.

'We recognize the force of these arguments and are not unmindful of the economic and social aspects of the problem posed by these interveners. We are not authorized, however, to *regulate rates* for natural gas sold *directly* to industrial consumers, which class of gas sales furnishes the keenest competition to the coal industry. Nor does our power to *suspend rates* extend to *indirect* sales of natural gas for industrial purposes. It appears, *therefore*, that the Natural Gas Act does not vest this Commission with *complete* and *comprehensive* authority which would permit us to act as arbiter over the end uses of natural gas.'" (Emphasis supplied) *The First Five Years Under the Natural Gas Act*, p. 15, January, 1944.

ceded that it has no power at all to give consideration to end use in certificate proceedings.[20] Other declarations of the Commission to Congress make this clear.

In a report to the Senate Committee on Interstate Commerce on S. J. Res. 92,[20] dated January 17, 1944, and submitted in April, 1944, the Commission unequivocally stated that the amendment to Section 7 of the Natural Gas Act gave it broadened powers to consider the social and economic aspects of the use of natural gas as well as the impact on competing fuels in certificate cases. The report of the Committee itself recognized this authority in the Commission.[21]

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[20] S.J. Res. 92, 78th Cong. 2d Sess. (1944), would have directed the Commission to conduct an investigation of the natural gas industry. The Commission's Report is found at pp. 3-6 of the Senate Committee's Report. See footnote 21 below.

[21] The Senate Committee on Interstate Commerce in reporting favorably on S.J. Res. 92, as amended, said: "The resolution directs the Federal Power Commission in pursuance of the authority vested in it by the Natural Gas Act of June 21, 1938, as amended February 7, 1942, to investigate and report to Congress relative to • • • (b) the present and anticipated utilization of natural gas, resultant economic waste and undesirable competition with and displacement of other fuels, the feasibility of converting natural gas and constituent hydrocarbons for chemical and other *superior* uses, and (c) other matters relating to the production, transportation, distribution, sale, and utilization of natural gas helpful to Congress in connection with possible further legislation to restrict unnecessary waste or depletion of natural gas reserves or the utilization of natural gas *for inferior* or otherwise undesirable purposes in competition with other fuels.

• • • • • • • • • • • •

"The purpose of the resolution is to secure for the use of the Congress the information required in the consideration of appropriate legislation for the conservation of natural gas. • • • The Federal Power Commission appears to be the appropriate agency to conduct such an investigation. In administering the Natural Gas Act; *particularly Section 7(c) thereof, as amended*, dealing with the issuance of certificates of public convenience and necessity authorizing the transportation or sale of natural gas in interstate

On September 22, 1944, two months before the Senate Committee Report on S. J. Res. 92 was issued, the Commission issued its own Order instituting the Natural Gas Investigation, Docket No. G-580 (4 FPC 725). The Joint Resolution then died on the legislative calendar; obviously there was no longer any need to *direct* the Commission to conduct such an investigation.

In 1946, the Commission began its investigation into the natural gas industry with the specific purpose of determining "whether further legislation should be recommended to Congress * * * with respect to matters involved in the conservation and utilization of natural gas * * *." 4 FPC 725, 727 (1944).

Extensive hearings were held in numerous producing and consuming centers throughout the country. The hearing record, developed in 85 hearing days, amounted to 14,434 pages of transcript and 477 exhibits. Testimony was received from 320 witnesses including members of Congress, governors and other State officials.[22] At the conclusion of the hearings two separate reports were issued, one by Commissioners Olds and Draper and the other by Commissioners Smith and Wimberly. The Olds-Draper Report found that "the Natural Gas Act, as amended in 1942, should not be further amended in any fundamental way." (p. 12) The Smith-Wimberly Report, while recommending certain legislative changes, did not make any recommendations affecting the recognized authority of the Commission to consider the end use and conservation aspects of the problem pursuant to the Act as amended. Both reports were submitted to Congress on April 28, 1948.

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commerce and subject to the jurisdiction of the Commission, *the Commission is directly concerned with the problem of conservation of natural gas.*" (Emphasis supplied) S.Rep. No. 1234, 78th Cong., 2d Sess. (November 1944), pp. 1-2.

[22] See Smith-Wimberly Report, Docket No. G-580, p. 2.

Congress was fully aware of the Commission's interpretation of its authority to consider conservation as an element of public convenience and necessity and later reports of the Commission to Congress as well as numerous Congressional hearings where the matter was brought up for discussion, bear this out.[23]

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[23] In 1947, FPC Chairman Smith testifying before a Subcommittee of the Senate Interstate and Foreign Commerce Committee in connection with certain proposed legislation to further amend the Act said:

> "From the language of the proposal it appears that the Commission should give no consideration whatever to the nature and extent of the markets proposed to be served under authorization granted by a certificate. *Just how public convenience and necessity could be determined without any consideration of the market and the nature of the demand for gas is hard to see.*" (Emphasis supplied) (Hearings on S. 734 and S. 1028, 80th Cong., 1st Sess., 60 (1947); the Bills were never reported out.)

Note also the following colloquy between Congressman Dolliver and Chairman Harris of the House Subcommittee on Petroleum and Federal Power in 1949 during a hearing involving a proposed amendment to the Act:

> "MR. HARRIS. Well, did not the Federal Power Commission divert gas during the critical shortage of fuel last year from one area to another to relieve critical emergencies?
>
> "MR. DOLLIVER. Mr. Chairman, I am not informed on that; I do not know.
>
> "MR. HARRIS. That is a fact. You remember the gentleman from Michigan, Mr. Sadowski, who is a member of this committee, was very much interested in the action of the Federal Power Commission in that regard, which I mention merely to show that the Federal Power Commission does have at the present time authority and pursues the policy protecting, so far as possible, the users of gas and other fuels." (Hearings on H.R. 79, H.R. 1758 and H.R. 982, 81st Cong., 1st Sess., (1949) p. 12; none of the Bills was reported out.)

Thus, since the enactment of the 1942 amendments, Congress has left the Commission free to fashion the policy on end use conservation and to apply that policy in certificate proceedings.

B. The Development of the Commission's Conservation Policy On Boiler Fuel Use

Curiously, the court below gave greater weight to three paragraphs from the Commission's 1944 report than to its consistent policy developed over the years of considering end use of gas in determining the public convenience and necessity (R. 315-316), a policy inuring to the benefit of the smaller consumers, and one which did not incur significant industry disfavor until it frustrated the joint design of a major public utility and one of the country's large pipelines.

As early as its 1940 report to Congress, the Commission emphasized superior domestic and industrial uses of natural gas, contrasting them with its use as boiler fuel which the Commission characterized as "of very questionable social economy" under most circumstances. 20 FPC Ann. Rep. 79 (1940).[*] In its Natural

[*] In this connection, the Commission noted that natural gas "* * * is especially adapted to space and water heating in urban homes and other buildings and to the various industrial heat processes which require concentration of heat, flexibility of control, and uniformity of results. Industrial uses to which it appears particularly adapted include the treating and annealing of metals, the operation of kilns in the ceramic, cement, and lime industries, the manufacture of glass in its various forms, and use as a raw material in the chemical industry." (Id. p. 79).

In a subsequent proceeding, the Commission reiterated its belief that "The utilization of large volumes of natural gas under boilers of an electric generating plant tends to dissipate natural gas reserves otherwise available for essential domestic and general service use. * * *" *Mississippi River Fuel Corp.*, 12 FPC 111, 115 (1953).

Gas Investigation from 1946 to 1948, Docket No. G-580, the Commission reviewed at length the unique advantages of gas for particular domestic and industrial purposes and found boiler fuel use to be a low value use in comparison to others which take full advantage of the intrinsic qualities of natural gas (Smith-Wimberly Report, Docket No. G-580, pp. 378, 389 (1948)).

In certificate applications, the Commission has repeatedly considered use aspects as bearing upon the public convenience and necessity, supporting the grant of a certificate where superior industrial uses are involved,[25] and weighing against it where an inferior use is involved. Out of these and numerous other Commission cases a basic administrative policy has been evolved:

> "* * * that the use of natural gas as boiler fuel is an inferior usage and that, while it is not to be denied in all situations, it should be permitted only on a positive showing that it is required by pubic

[25] To illustrate: In its Opinion No. 279 issued December 28, 1954, *Re* Iroquois Gas Corp. et al, Docket Nos. G-2310 et al, in authorizing firm service for resale to an industrial consumer the Commission said: "The evidence shows that this gas would be dedicated to a superior use in the processing of materials such as chrome chemicals, caustic soda, soda ash, periclase and cement." (mimeo copy p. 12; printed 1954 Reports not yet available);

In Re Transcontinental Gas Pipe Line Corporation, Docket No. G-4185 et al, where the Commission authorized firm deliveries of gas to Owens-Corning Fiberglas Corporation, the Commission stated: "The evidence shows that this gas is dedicated to a superior use in the manufacture of glass fiber strands, involving substantial national defense considerations, and that other fuels are not suitable for this purpose. Under these circumstances, the public convenience and necessity require that firm service be rendered to Owens-Corning by Transcontinental in accordance with a proposed contract between the parties set out as an exhibit in this proceeding." (14 FPC 1, 4 (1955).)

convenience and necessity." Re *Mississippi River Fuel Corp.*, 12 FPC 109, 112 (1953).

The Commission's boiler fuel policy did not develop from resolving a simple conflict between industrial and domestic uses. This was the rudimentary concept of the court below,[26] which strongly implied that the Commission did not reach a "rational conclusion" on the evidence before it because apartment house dwellers would ultimately get some benefit of light and heat from the gas to be burned under the Waterside boilers (R. 323-324). But this ignores the fundamental fact that the type of fuel used to generate steam for heat or production of electricity adds nothing to the composition of that steam. The qualities of gas that make it peculiarly adaptable to specialized uses are squandered in steam generation.

Trespassing in this area of administrative expertise, it is understandable that the court should completely misinterpret the Commission's boiler fuel policy. This policy has been followed not by uniformly denying certificates seeking permission to burn gas under boilers, but by keeping such use under careful limitations: certificating it in restricted quantities on an interruptible basis in order to make total pipeline operation more economical by boosting the load factor;[27]

[26] The Court of Appeals measured the Commission's finding of inferiority by juxtaposing domestic against industrial uses. Since some of the power generated by the gas-heated boilers was used for making steam for heating and electricity for lighting of apartment houses, the court seemed satisfied that in its own judgment the use of gas as boiler fuel was a superior use in this case, although it insisted that "the weighing of factors of this kind * * * is a matter in which a reviewing tribunal will not interfere * * *." R. 323-324.

[27] The Commission has certificated interruptible boiler fuel service in the following typical cases. *Transcontinental Gas Pipe Line Corp.*, 11 FPC 605, 615 (1952) (up to 30,000 Mcf per day to Duke

certificating firm boiler use only in extraordinary circumstances;[28] and denying a certificate, as it did here, in the absence of a positive showing that boiler fuel use is required by the public convenience and necessity.[29]

(*Footnote 27 continued*)

Power Company in South Carolina, where coal prices were somewhat in excess of gas, and Transco showed that a bottleneck prevented transportation of all the gas northward during "valley" periods, see also 14 FPC 436 (1955); *Texas Gas Transmission Corp.*, 12 FPC 658 (1953) (Examiner's decision which became final), up to 30,000 Mcf per day to Mississippi Power & Light Co., where there was evidence of considerable fuel savings and the pipeline showed a bottleneck resulting in excess capacity; *Southern Natural Gas Co.*, 14 FPC 243, 250 (1955) (two Commissioners dissenting) *aff'd sub. nom. Charleston & W.C. Ry.* v. *FPC*, 234 F. 2d 62 (D. C. Cir. 1956), 10,000 Mmcf per year to South Carolina Generating Co.; *Northern Natural Gas Co.*, 15 FPC 1634 (1956) (one Commissioner dissenting, one not participating in reversal of 15 FPC 682, two Commissioners dissenting), *aff'd sub. nom. National Coal Association* v. *FPC*, 247 F. 2d 86 (D. C. Cir. 1957), up to 14,400 MMcf a year to Northern States Power Company in Minnesota.

[28] In *Houston Texas Gas & Oil Corp.*, 16 FPC 118 (1956), (two Commissioners dissenting) the Commission certificated firm and interruptible transportation arrangements for two Florida power companies because of the "atypical" character of the Florida markets, as the only way to render construction of the first pipeline to Florida economically feasible, a case which was *sui generis*, as the Commission said. In *East Tennessee Natural Gas Co.*, 8 FPC 836 (1949) *aff'd sub. nom. National Coal Ass'n.* v. *FPC*, 191 F. 2d 462 (D. C. Cir. 1951), the Commission authorized a firm service of 60,000 Mcf per day to the Atomic Energy Commission at Oak Ridge, Tennessee when the A.E.C. intervened because the project was "necessary to assure the common defense and security of this country." 8 FPC at pp. 841-842.

[29] *Northern Natural Gas Co.*, 4 FPC 1099 (1945), permitted for pilot burners, ignition fuel, and emergency standby only; *Panhandle Eastern Pipe Line Co.*, FPC Opinion 274 (July 28, 1954), where the claim was made of coal fly ash air pollution in Monroe, Michigan; *Texas Gas Transmission Corp.*, 10 FPC 391 (1951) (one Commissioner dissenting); *Piedmont Natural Gas Corp.*, 9 FPC 70, 83-90, 629 (1950) (one Commissioner concurring in the result).

By its decision the court below has foreclosed the Commission from giving any consideration to the relative superiority or inferiority of the use for which the gas is intended. No matter what the public convenience and necessity might suggest as a suitable alternative to profligate burning of gas under boilers, the Commission cannot do other than approve the boiler fuel application. For example, to continue to encourage the development of underground gas storage, as it has done for years on Transco's system,[30] in substitution for boiler fuel sales, would be beyond the Commission's authority. Instead of giving due weight to the Commission's interpretation of its own authority as reflected by its repeated consideration of end use aspects of conservation in certificate proceedings, *Bochm* v. *Commissioner*, 326 U.S. 287, 292 (1945); *Panhandle Eastern Pipeline Co.* v. *FPC*, 232 F. 2d 467, 471 (3rd Cir. 1956), *cert. denied*, 352 U.S. 891 (1956), the court below has destroyed the long-established policy of the Commission of considering them as bearing upon the public convenience and necessity.

(*Footnote 29 continued*)

In *Southern Natural Gas Co.*, 22 FPC 211, 215 (1959), the Commission refused authorization to install certain compression facilities which would be used largely to increase deliveries of boiler fuel gas. In *United Gas Pipe Line Co.*, 21 FPC 64, 65 (1959), the Commission conditioned certificate to specifically exclude use of facilities to deliver gas for boiler fuel for the generation of electricity. See also *El Paso Natural Gas Co.*, 22 FPC 900 (1959).

[30] 7 FPC 24, 39, 40 (1948); 9 FPC 32, 47, 48 (1950); *Re* Texas Eastern Transmission Corp., *et al*, Docket No. G-2340, *et al*, Findings and Order Issuing Certificates of Public Convenience and Necessity, dated April 29, 1954; 21 FPC 839, 843, 844 (1959). In its order denying the application for the X-20 service the Commission found that X-20 would to a very large extent serve to offset although not of itself entirely nullify, the clear advantages in the public interest of Transco's proposed utilization of the Leidy storage project (R. 178a).

C. The Courts' Interpretation of the Commission's Authority to Consider End Use in Certificate Proceedings

Other courts which have reviewed Commission orders in certificate cases where end use was considered as bearing on public convenience and necessity have held that such consideration was fully within the power of the Commission to undertake. But the court below held that the Commission exceeded its jurisdiction when it gave any consideration at all to the use of the gas by Con Edison and found it inferior as measured by the standard of public convenience and necessity. The court saw neither conflict nor inconsistency between its decision and those of the Court of Appeals for the District of Columbia (R. 318-319).[31]

In *Charleston & W. C. Ry.* v. *FPC*, 234 F. 2d 62 (D.C. Cir. 1956), the Court of Appeals for the District of Columbia affirmed an order of the Commission certificating the gas company to construct and operate a line for the delivery of natural gas to an electric company for use as boiler fuel (two Commissioners dissenting). The court held that the Commission properly considered the conservation aspects of the use of the gas as well as the adverse effect upon the railroad and coal mining industries, in passing upon the question of public convenience and necessity. The court said (at p. 64):

> "In the circumstances that we have outlined we find no legal basis for overturning the decision of the Commission. The Commission weighed the factors which competed in their minds on the issue of public convenience and necessity, with the evi-

[31] "To say that considerations of conservation are not controlling does not aid in deciding whether or not such matters may be considered at all." (R. 319). The court below also suggests that the Court of Appeals for the District of Columbia did not look at the legislative history of the Act because "there was no need to make such a search." (R. 319).

> dence bearing thereon. Important among these factors is the public interest in railroad transportation, and in the status of coal mining in its employment and other economic aspects. But the Commission considered these matters. The conclusion reached in favor of the application is not unreasonable, and no significant procedural error appears . . . Had the decision initially been for us we might have reached a different conclusion, on the ground of the dissent [i.e. that conservation considerations required denial] or on other grounds. But the judgment of the Commission was within its legal competence."

In *National Coal Ass'n* v. *FPC*, 191 F. 2d 462 (D.C. Cir. 1951), the same Court of Appeals held that in a certificate proceeding the end use of the gas was among the elements the Commission was authorized to consider (together with the effect of issuance of the certificate upon competing fuels and transportation and related labor interests) in the "complex" of public convenience and necessity, although not a determinative factor. (*Id.* at p. 467.) Cf. *Department of Conservation* v. *FPC*, 148 F. 2d 746 (5th Cir. 1945), *cert. denied*, 326 U.S. 717 (1945).[32]

The court below seemed to justify its departure from the principle of these cases by suggesting that the pipeline companies involved in them were both selling and transporting the gas, instead of merely transporting it, as Transco did here (R. 319).[33] But this certain-

[32] In that case the court assumed without deciding that end use considerations were factors to be weighed in certification proceedings.

[33] Actually the Court of Appeals has now abandoned this apparent distinction, for in *Lynchburg Gas Co.* v. *FPC*, 275 F. 2d 847 (3rd Cir. 1960), which involved resale gas and not transportation gas, the court held that its decision in the instant case disposed of the end use conservation question raised there.

ly should make no difference in the result. It is well established by the decisions of this Court that "transportation" and "sale" of gas are entirely "separate subjects of regulation," and that the provisions of the Act apply with equal force to both of them. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 516 (1947); *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, 468 (1950). See also *Panhandle Eastern Pipe Line Co.* v. *FPC*, 232 F. 2d 467 (3rd Cir. 1956), *cert. denied*, 352 U.S. 891 (1956), where the court below itself said: "This control over gas transportation by the Commission is completely independent of the sale of the gas and just as important. It is a separate subject of regulation irrespective of whether the particular gas is thereafter sold for resale or direct to consumers." (*Id.* at p. 471).

Disregarding this Court's declaration of the scope of the Commission's authority to consider conservation aspects in certificate cases set forth in the *East Ohio* and *Hope* cases, supra, pp. 17-20, disavowing as well the rationale of the other decisions reviewed here, the court below has introduced a new principle into the law by holding that end use considerations are beyond the Commission's legal competence in these cases.

II. THE COURT BELOW HAS ARBITRARILY RESTRICTED THE COMMISSION'S AUTHORITY TO EVALUATE THE PROPOSED TRANSPORTATION SERVICE IN TERMS OF THE PUBLIC CONVENIENCE AND NECESSITY.

Section 7(e) of the Natural Gas Act, 56 Stat. 84 (1942), 15 U.S.C. § 717 f(e) does not catalogue the elements that the Commission must consider in deciding whether a proposed transportation service is required by the public convenience and necessity. It requires the Commission to make two distinct findings: (1) that the applicant "is able and willing

properly to do the acts and to perform the services proposed"—here, the "conventional requirements" must be satisfied; and (2) "that the proposed service . . . is or will be required by the present or future public convenience and necessity"—here, the "policy considerations" must be given effect.[34] While the court below acknowledged the propriety of using "experience-built" criteria in making the Commission's decision, it restricted those criteria to the "conventional requirements" such as "markets, facilities, gas supply and rates" (R. 312, 309). Because the Commission went beyond them and examined the broader implications which would affect the public's interests adversely, the court held that it exceeded its authority in denying the certificate (R. 312). As the court below would have it, if the pipeline, the industrial user, and their investors are satisfied, the Commission's inquiry is ended, and the broader interests of the public at large are shut out.[35]

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[34] In *National Coal Ass'n.* v. *FPC*, 191 F. 2d 462 (D. C. Cir. 1951), the court noted the dual requirement of Sec. 7(e), stating (at p. 467):

> "The Commission found that the certificate applicant 'is able and willing properly to do the acts and to perform the service proposed' *and further*, that the proposed construction and operation 'are required by public convenience and necessity'. These findings satisfy the statutory requirements and 'if supported by substantial evidence, shall be conclusive'." (Emphasis supplied)

[35] But compare Justice Frankfurter, dissenting in *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, at pp. 626-627 (1944):

> "Or the Commission's rate orders must be founded on due consideration of all the elements of the public interest which the production and distribution of natural gas involve *just because it is natural gas*. These elements are reflected in the Natural Gas Act, if that Act be applied as an entirety. See,

This short-sighted interpretation of the scope of the Commission's authority in certificate cases violates the consistent teachings of this Court. See *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 391 (1959), where this Court stated that § 7(e) requires the Commission to evaluate *all* factors bearing on the public interest" (Emphasis supplied). In case after case this Court has admonished the lower courts and the administrative agencies themselves to take the long view of the public interest, not the technicians' measure of so-called "conventional requirements."

Since the Federal Power Commission has functions and powers that are comparable to the Interstate Commerce Commission, *Chapman* v. *FPC*, 345 U.S. 153, 168 (1953), an examination of this Court's decisions under the various parts of the Interstate Commerce Act is revealing. In each of them the essential dispute was between the point of view which would have restricted the Interstate Commerce Commission to "conventional requirements"—although this slogan was not used—and that which advocated a broader perspective, encompassing the total public interest.

The Interstate Commerce Act, Part I, 24 Stat. 379 (1887), as amended, 49 U.S.C. §§ 1-27 (1958), regulates railroads and requires a certificate of public convenience and necessity for extension, new construction and

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for instance, §§4 (a) (b) (c) (d), 6, and 11, 15 U.S.C. §§717c (a) (b) (c) (d), 717e, and 717j. Of course the statute is not concerned with abstract theories of rate-making. But *its very foundation is the 'public interest', and the public interest is a texture of multiple strands. It includes more than contemporary investors and contemporary consumers. The needs to be served are not restricted to immediacy, and social as well as economic costs must be counted.*" (Emphasis supplied)

abandonment of railroad lines. The language of Section 1 (18) of the Act is practically identical to Section 7(c) of the Natural Gas Act.[36] Neither statute sets forth specific criteria for determining public convenience and necessity, and both of them speak of the present or future.

In *ICC* v. *Railway Labor Executives Assn.*, 315 U.S. 373 (1942), this Court affirmed the judgment of the District Court which had reversed the Commission's order denying a certificate of public convenience and necessity. The Commission claimed it had no power to attach conditions to protect the interests of railroad employees affected by a proposed abandonment. This Court held that the "public convenience and necessity" required the Commission to go beyond the immediate effects of the proposed abandonment of the railroad lines to consider its national effects, taking account of the national interest in the stability of the labor supply. *Id.* at pp. 376-377.

In *Transit Commission* v. *U.S.*, 284 U.S. 360 (1932), upholding the grant by the ICC of a certificate of

[36] "No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment." 24 Stat. 379 (1887), as amended, 54 Stat. 899-901 (1940), 49 U.S.C. §1 (18) (1958).

public convenience and necessity for the abandonment of an intrastate branch line, this Court held that the Commission had properly considered the needs of intrastate commerce as well as interstate commerce in taking a comprehensive view of the entire situation. *Id.* at p. 370. See also *Colorado* v. *U.S.*, 271 U.S. 153 (1926).

Sections 306 and 307 of the Interstate Commerce Act, Part II, require a certificate of public convenience and necessity for the operation of motor carriers in interstate commerce in language similar to that used in Section 7(e) of the Natural Gas Act.[37]

In one of the leading cases upholding the broad view of the Interstate Commerce Commission's certificate powers, this Court affirmed the grant of a certificate to a railroad's motor truck subsidiary, and rejected the trucking companies' arguments that it had to be denied in the absence of evidence that existing truck service is inadequate. *ICC* v. *Parker*, 326 U.S. 60 (1945). The trucking companies there advocated the conventional

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[37] "[N]o common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: . . ." 49 Stat. 551 (1935), as amended, 49 U.S.C. § 306 (1958).

* * * * *

"'[A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: . . .'" 49 Stat. 551 (1935), 49 U.S.C. §307 (1958).

requirements limitations of the court below. This Court said (at p. 65):

> "Public convenience and necessity is not defined by the statute. The nouns in the phrase possess connotations which have evolved from the half-century experience of government in the regulation of transportation. . . . The Commission has assumed, as its duty under these earlier subsections, the finding of facts and the exercise of its judgment to determine public convenience and necessity. This Court approved this construction. *Chesapeake & Ohio Ry. v. United States*, 283 U.S. 35, 42. *Cf. Gray v. Powell*, 314 U.S. 402, 411-412. The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. Cf. *Powell v. United States*, 300 U.S. 276, 287. This, of course, gives administrative discretion to the Commission, cf. *McLean Trucking Co. v. United States*, 321 U.S. 67, 87, 88, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances."

In *Parker*, the Court made it quite plain that the ICC must weigh the public interest in the different types of carriers in order to preserve the inherent advantage of each, and that public convenience and necessity should be interpreted to secure the broad aims of the Interstate Commerce Act. See also *Schaffer Transportation Co. v. U.S.*, 355 U.S. 83 (1957); *Dixie Carriers, Inc. v. U.S.*, 351 U.S. 56 (1956).

Similarly, in Part III of the Interstate Commerce Act governing water carriers, a certificate of public convenience and necessity is required.[35]

[35] "[N]o common carrier by water shall engage in transportation subject to this chapter unless it holds a certificate of public convenience and necessity issued by the Commission . . ." 54 Stat. 941 (1940), 49 U.S.C. § 909 (1958).

In *U.S. v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236 (1945), this Court affirmed the grant of a certificate by the ICC where the Commission had based its determination in part upon its estimate of post-war transportation needs. The Court held that future public convenience and necessity must be considered, and the Commission's expert judgment, including its future forecasts in such matters, is entitled to the same respect as its judgment concerning technical qualifications. The Court observed that an administrative agency's function is not only to "appraise the facts and to draw inferences from them, but also to bring to bear upon the problem an expert judgment, and to determine from its analysis of the total situation on which side of the controversy the public interest lies." *Id.* at p. 241. See *City of Pittsburgh* v. *FPC*, 237 F. 2d 741 (D.C. Cir. 1956); *National Broadcasting Co., Inc.* v. *U.S.*, 319 U.S. 190 (1943); *American Airlines, Inc.* v. *C.A.B.*, 192 F.2d 417, 420 (D.C. Cir. 1951)

The Court of Appeals' restrictive interpretation of the requirements of the public convenience and necessity reflects a judicial atavism which disregards the fundamental principle of this Court's decisions, that the public interest must be given wide scope in the administrative agency's judgment.

Appraising the "total situation" as it was bound to do, the Commission was concerned with the broad implications of the new type of transportation service represented by the X-29 proposal. It perceived the beginning of a trend in the gas industry of producers reluctant to submit to federal regulation, seeking out nonjurisdictional sales like the one to Con Ed'son here.[39]

[39] Since this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), independent producers "allergic" (R. 108a) to FPC jurisdiction have been eager to sell their gas to consumer purchasers like Con Edison.

It recognized the effect of these direct producer-consumer purchase agreements upon the availability of gas supplies and the price of gas in the field upon which the general consuming public is obliged to rely.

The record in this case shows that Con Edison itself intends to expand the X-20 service to 120,000 Mcf per day after approval of this certificate (R. 8a-9a, 24a). In its original opinion denying this certificate the Commission pointed out that "out of approximately 100 million Mcf that is proposed ultimately to be brought through Transcontinental's lines for Con Edison's use in 1961, almost 44 million Mcf would be under a purchase-contract carriage arrangement. That is the equivalent to a pipeline of about 120 million Mcf per day capacity at 100% load factor" (R. 179a). The record also shows that other Transco customers, including large utilities like Long Island Lighting Company, Public Service Electric and Gas Company of New Jersey, and Duke Power Company had been discussing similar transportation arrangements with Transco awaiting the outcome of the X-20 application (R. 63a-71a). Even while this application was pending the Commission had under consideration another application by Transco (Docket No. G-12059) to transport boiler fuel gas for the account of Virginia Electric and Power Company.[40]

The acquisition of natural gas supplies is a highly competitive business, and the Commission and the courts have recognized it. See *Florida Economic Advisory Council* v. *FPC*, 254 F. 2d 643, 647 (D.C. Cir. 1957). The Commission applied this significant policy

[40] The certificate was denied on the limited ruling of inadequacy of transportation charge and did not reach the important questions involved here. 20 FPC 843 (1958).

consideration with the knowledge that pipelines subject to its jurisdiction are experiencing increasing difficulties in acquiring gas reserves,[41] and that the impact of the large demands of utilities bidding against the limited gas supplies in attempting to reserve for themselves a firm supply of gas, results in upward pressure

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[41] That Con Edison's purchases have had an impact on the gas supply area of the southwest was evident in two separate proceedings before the Commission not involving Transco, but other pipeline companies attempting to acquire gas for their resale markets. Note the testimony of E. Rue Thomas, Superintendent of Gas Supply Department, Trunkline Gas Company, in a proceeding involving Trunkline in Docket No. G-15394, et al. on November 17, 1958, as follows: "A. Wityout [sic] specifically talking of the contract here, during 1957 we had made many efforts to buy gas. I had particularly worked on three that I mentioned over here and which we offered prices that were not what I would call the current price, but were still higher than we were presently paying and we missed in every instance of buying that gas in 1957. So, certainly, we have been burnt not being able to buy gas on a competitive bidding basis, we were approaching a point where we were being unable to buy gas. One specifically was the Normanna field in Texas. That is the gas being purchased for use by Consolidated Edison as boiler fuel in New York and we worked toward trying to buy that gas and we were unsuccessful in our bidding on it." (Tr. 114-115).

Also in point in another separate, unrelated proceeding is the testimony of F. P. Burns, Vice President in charge of Production, for Peoples Gulf Coast Natural Gas Pipeline Company and Natural Gas Pipeline Company of America, both large interstate transporters and sellers of gas, in a recent certificate proceeding involving both pipeline companies, who stated, inter alia, "We talked with the Dougherty interests at Normanna, and when a court decision—and I don't know the proper citation for it—came out that gave new life to the Consolidated Edison deal, Dougherty's lost their enthusiasm for trading with us in the interstate deal, because they were going to wait it out, because the Con. Ed. would be available to them when they finally achieved it." (Tr. 777). The court decision was later identified as the ruling of the Third Circuit Court of Appeals on November 3, 1959, which is here under review. Tr. 788-789, April 14-15, 1960, Docket No. G-19086 et al.

on-rate levels in the fields and lessening the availability of gas for the resale market."

Transco's own Vice President in Charge of Gas Supply testified at length about its difficulties in acquiring new reserves (R. 58a-63a). And Transco's gas supply had dwindled from 20 to 13 years deliverability life between the time of its first certification in 1948[11] to the time of the hearings on this application (R. 119a).[12]

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[11] The broad sweep of the Third Circuit's ruling is epitomized by the concurring opinion of Commissioner Kline in *Re* Peoples Gulf Coast Natural Gas Pipeline Co., Docket No. G-19086, et al. issued on July 29, 1960, where he said:

> "Consolidated Edison of New York has purchased large quantities of gas at 19.25¢ per Mcf in Duvall and Bee Counties in Texas Railroad Districts 4 and 2, respectively, for use for industrial purposes in the State of New York. This Commission declined to issue a certificate for the transportation of this gas, which decision was based in part upon the effect which the purchase of the gas would have upon the prices charged by producers selling gas in interstate commerce subject to our jurisdiction. However, we were reversed by the Circuit Court of Appeals for the Third Circuit in this matter and if that decision remains law we are powerless to prevent such purchases.
>
> "The large purchases of non-jurisdictional gas now being made by out-of-state industrial users at even higher prices and the rapid industrial expansion of this area of Texas with the resultant increased demand for intrastate gas leads me to the conclusion that in a short time there will be no gas available for the jurisdictional interstate market at a price of 18¢." Order Amending Order Issuing Certificates of Public Convenience and Necessity and Denying Petition for Rehearing, mimeo copy, concurring opinion, pp. 2, 3.

[12] 7 FPC 24, 32.

[13] Rather than getting better, Transco's gas supply problems are getting worse, as is evident by a recent order of the Commission in which the Commission declined to issue a certificate to Transco

Quite apart from the effects on the *present* public convenience and necessity, the ruling of the court below would drastically curtail the Commission's power to give effect to these important policy considerations on the *future* public convenience and necessity in evaluating this or any other proposed transportation service. This Court never contemplated such a result. *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 391 (1959); *U.S.* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236 (1945). The very essence of the Commission's certification function is the balancing of policy considerations, appraising their future implications, and making a considered judgment whether the statutory requirements of the public convenience and necessity have been fulfilled.

III. THE DECISION OF THE COURT BELOW IMPAIRS THE POSITION OF COMPETING FUEL AND TRANSPORTATION INTERESTS.

In denying the Commission any authority at all to consider end use conservation in a certificate proceeding, the court below has seriously impaired the position of producers and transporters of competing fuels and their thousands of employees. Introduction of natural gas into markets where coal is utilized invariably results in displacement of coal, and thus it is in certificate

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covering a further expansion of its pipeline system, because of Transco's failure to demonstrate that its gas reserves were adequate to support the expansion proposed. In remanding the application for further study and consideration the Commission said: "A substantial portion of the minimum supply showing presented by Transco in these proceedings appears to be supported more by hopeful optimism than by firm facts." *Re: Transcontinental Gas Pipe Line Corp., et al*, Docket No. G-20107, *et al*, Order Remanding Applications, issued August 26, 1960, mimeo copy, p. 3.

proceedings that the issue between contending fuel interests is resolved."

Representing coal producers, coal carriers, and union employees in the coal industry, these petitioners have appeared in over two hundred separate dockets of the Federal Power Commission on applications for certificates of public convenience and necessity. The social and economic consequences of the constant encroachment of natural gas to the coal industry and those dependent on it for their livelihood are dramatically reflected in the post-war trends. Since 1946 coal's share of the coal-competitive market dropped from 55.8 per cent to 32.3 per cent in 1959, while natural gas increased its share of this energy market from 11.6 per cent in 1946 to 33.7 per cent in 1959.[46] In coal-competitive areas alone the use of natural gas for the underfiring of boilers in generating electricity had increased in 1959 by over 500 per cent above the 1946 level of

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[45] That end use considerations are a vital element in resolving this conflict is apparent from the court's opinion in *Charleston & W. C. Ry. v. FPC*, 234 F. 2d 62, 64 (D. C. Cir. 1956). After commenting upon the conflict between the coal and the gas interests in the proceeding before the Commission, the court quoted from the opinion of the dissenting commissioners:

> "'In these circumstances, the primary issue becomes a question of conservation of natural gas and we have a clear-cut case of whether to authorize the burning of quantities of this natural resource under boilers, where the evidence is clear that other fuels are readily and economically available, or to deny such authorization and preserve such quantities for superior uses.'" *Id.* at p. 64.

[46] Source: U.S. Bureau of Mines, Minerals Yearbook, Vol. 2, 1952, p. 117; Minerals Yearbook, 1947, p. 823-825; U.S. Bureau of Mines, Weekly Coal Report No. 2216, Table 15, less estimated consumption of natural gas for field use and production of carbon black.

such use.[47] Although boiler fuel uses represent its primary outlet, coal's percentage share of the electric generating market has declined over these years. In this case the record shows that 640,000 tons of coal would be displaced immediately by the X-20 proposal (R. 105a).

By amending the Natural Gas Act in 1942 Congress obviously intended the Commission to consider the social and economic effects of the expansion and extension of natural gas transportation facilities upon producers and transporters of competing fuels. H. Rep. No. 1290, 77th Cong., 1st Sess.; S. Rep. No. 948, 77th Cong. 2d, Sess.; *National Coal Ass'n* v. *FPC*, 191 F. 2d 462 (D.C. Cir. 1951); *supra*, pp. 16, 17, 31. But the Commission cannot reach this question without considering the use of the gas in a proposed service under a certificate application.

Any new gas use which usurps an established market of a competing fuel necessarily involves a value judgment whether the new use or the old one better serves the public convenience and necessity. This is the judgment that Congress intended the Commission to exercise when it amended Section 7 of the Natural Gas Act in 1942.

While paying lip service to the principle of administrative competence to make value judgments in the field of its own expertise (R. 321), the court below at the same time has second-guessed the administrators of the Act by implying that their judgment as to the inferior-

[47] U.S. Bureau of Mines, Minerals Yearbook, 1947, pp. 824-825; Federal Power Commission, Form No. 4, Monthly Fuel Consumption Reports for 1959. The less coal-competitive regions of West South Central (Ark., La., Okla., Tex.) and Pacific (Wash., Ore., Calif.) were excluded from this computation.

ity of the proposed use was not a "rational" one (R. 323-324). What the court has really done is substituted its own notions on conservation policy for the Commission's judgment, and rationalized its decision by asserting that the Commission put something into the Act that Congress did not intend.

By so doing the court has exceeded its limited function of appellate review. For it is the function of the Commission, not of the reviewing court, to weigh the conflicting policy considerations and to apply its administrative judgment in determining whether the proposed service is required by the present or future public convenience and necessity. Indeed, the court below violated its own statement of this precept in *P.U.C. of Conn.* v. *FPC*, 205 F.2d 116 (3rd Cir. 1953), in which it said (at p. 121):

> "Having concluded that the Commission had the power to do what it did and that it acted fairly in doing so, *we cannot concern ourselves with the policy factors bearing on whether it should have done so.*" (Emphasis supplied)

See also *Michigan Consolidated Gas Co.* v. *FPC*, 246 F.2d 904, 912 (3rd Cir. 1957), *cert. denied*, 355 U.S. 894 (1957); *Kentucky Natural Gas Corp.* v. *FPC*, 159 F.2d 215, 218 (6th Cir. 1947); cf. *U.S.* v. *Pierce Auto Lines*, 327 U.S. 515, 535-536 (1946); *Norfolk Southern Bus Corp.* v. *U.S.*, 96 F. Supp. 756, 758 (E.D.Va. 1950), *aff'd per curiam*, 340 U.S. 802 (1950).

To determine on "which side of the controversy the public interest lies" the Commission must analyze "the total situation," *U.S.* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945). But it cannot reach out to embrace "the total situation" in order to determine

whether the public interest requires that vast tonnages of coal be displaced by natural gas to fire public utility boilers, without looking at the use to be made of the gas and weighing the relative advantage and disadvantage in the totality of the public interest. The Federal Power Commission, which Congress entrusted with the administration of the Natural Gas Act, is uniquely qualified to make this judgment. *Charleston & W. C. Ry.* v. *FPC*, 234 F.2d 62, 64 (D.C.Cir. 1956). Its administrative judgment on the evidence before it should be upheld by this Court.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the Commission's Order should be affirmed.

Respectfully submitted,

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September 20, 1960

APPENDIX

I. Pertinent Provisions of the Natural Gas Act

Necessity For Regulation Of Natural-Gas Companies

SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. [52 Stat. 821 (1938); 15 U.S.C. § 717(a)]

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717(b)].

Extension or Facilities; Abandonment of Service

SECTION 7.

. . . . . .

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural gas company a certificate of public conveni-

ence and necessity issued by the Commission authorizing such acts or operations; *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made, and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)].

. . . . . .

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construc-

tion, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)].

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Rehearing; Court Review of Orders

SECTION 19

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(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm,

modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the Court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

* * * * * * * * * *

2. As Originally Enacted June 21, 1938 by Public Law No. 688 (H.R. 6586), 75th Congress, 3d Session, Chapter 556, 52 Stat. 821, 825, Section 7(c), reads as follows:

(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or addi-

tional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however*, That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.

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SUPREME COURT OF THE UNITED STATES

Nos. 45 and 46.—October Term, 1960.

Federal Power Commission, 45 v. Transcontinental Gas Pipe Line Corp.	On Writs of Certiorari to the United States Court of Appeals for the Third Circuit.
National Coal Association, et al., 46 v. Transcontinental Gas Pipe Line Corp.	

[January 23, 1961.]

Mr. Chief Justice Warren delivered the opinion of the Court.

The question in these cases is whether the Federal Power Commission has gone beyond the scope of its delegated authority in denying a certificate of public convenience and necessity under § 7 (e) of the Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U. S. C. § 717 *et seq.*[1] The principal respondents[2] are Transcontinental

[1] Section 7 (e), 15 U. S. C. § 717 (e), provides:

"Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power

[*Footnote 2 is on p. 2*]

Gas Pipe Line Corp. (Transco), a pipeline company engaged in transporting natural gas in interstate commerce, and Consolidated Edison Co. (Con. Ed.), a public utility in New York City which uses gas under its boilers and also sells gas to domestic consumers. In 1957 Con. Ed. contracted to purchase gas from producers in the Normanna and Sejita fields in Texas at 19½ cents per Mcf., the contracts of sale containing a prohibition on resale of the gas by Con. Ed. This transaction is commonly labeled a "direct" sale and, because it does not entail a sale for resale in interstate commerce, is not subject to the Commission's jurisdiction except insofar as § 7 requires the Commission to certificate the transportation of gas pursuant to the sale.

Con. Ed. then arranged with Transco for what is called in the record "X-20" service. Under the contract, Transco agreed to transport 50,000 Mcf. daily to Con. Ed. in New York for use under Con. Ed.'s boilers, principally two boilers at Con. Ed.'s Waterside station which were then being fired by coal. Additionally, during a 60-day peak period, Transco agreed to sell 50,000 Mcf. to Con. Ed. from Transco's own reserves without restrictions as to resale. This 60-day supply was designed for use by Con. Ed.'s customers during the winter period when heating demands were at their highest. Transco sought a

so attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

[2] In addition to the petitioning Federal Power Commission and respondents Transco and Con. Ed., several other parties have been involved in this litigation. The City of New York is a named respondent and the petitioners in No. 46 include the National Coal Association, the United Mine Workers of America, and the Fuels Research Council, Inc. Several parties have filed briefs as *amici curiae* in this Court, including the regulatory commissions of California, Michigan, and Wisconsin. These state commissions have argued in support of the Federal Power Commission's position.

certificate of public convenience and necessity for the proposed X-20 service in connection with its plan to conduct a major expansion of its pipeline capacity and storage facilities.

Before the hearing examiner, Transco's application was opposed by the FPC staff and groups representing the coal industry. Con. Ed. intervened in favor of Transco's proposal. Transco offered proof that its application met all the conventional tests—adequate gas reserves, pipeline facilities and market for the gas—and this showing, with one immaterial exception, has never been challenged. However, the FPC's staff argued vigorously that the public interest would suffer were Transco's petition granted. Among the grounds advanced were that the gas was to be transported for use under industrial boilers, this disposition being an "inferior" use from the standpoint of conserving a valuable natural resource; that authorization of this and similar direct sales to major industrial users would result in pre-emption of pipeline capacity and gas reserves to the detriment of domestic consumers competing for gas supply; and that the effect of this sale, as well as the resulting increase in direct sales, would effect a general rise in field prices. These contentions were presented as "policy" arguments and no testimony was taken in support. Con. Ed. contended in return that certification was in the public interest, principally because a firm supply of natural gas under the Waterside boilers would reduce the air pollution problem then being aggravated by fly-ash and sulphur dioxide emissions from these boilers. The Waterside station is located near the United Nations and Con. Ed. introduced expert testimony indicating that the Waterside boilers were major contributors to the air pollution problem in the area. Respondents also contended that the factors propounded by the FPC's staff were not open for consideration in a § 7 proceeding. The hearing

examiner agreed with respondents that his determination was limited to conventional factors and consequently recommended certification. He qualified his recommendation, however, with a statement that, if he were authorized to consider the policy argument related to the end use of the gas advanced by the FPC staff, he would come to the opposite conclusion. He indicated that respondents' proof concerning the air pollution problem was not sufficiently compelling to overcome this contrary argument.

On review before the full FPC, the Commission held that the broad considerations advanced by its staff were cognizable in a § 7 proceeding. The Commission agreed with respondents that the "idea of ameliorating a smoke condition found unpleasant and annoying . . . is an attractive one" but concluded that "more weighty considerations compel the denial of the grant." 21 F. P. C. 138. Respondents sought a rehearing before the Commission and, upon denial of that petition 21 F. P. C. 399, appealed to the Court of Appeals. The Court of Appeals reinstated the conclusion of the hearing examiner that the policy considerations advanced by the FPC were outside the scope of a § 7 proceeding. The court relied principally on § 1 (b) of the Natural Gas Act, 15 U. S. C. § 717 (b), which provides:

> "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

The court also expressed sympathy with respondents' contention that the Commission had given inadequate weight to the air pollution factor but the holding below does not appear to be based on that ground. 271 F. 2d 942.

The principal question before this Court, then, is whether Congress intended to preclude the Commission from denying certification on the basis of the policy considerations advanced by its staff. For purposes of analysis, the litigants have grouped these factors into two broad categories. The first has been labeled the "end use" factor and reflects the Commission's concern that Con. Ed.'s proposed "inferior" use of gas under its industrial boilers would be wasteful of gas committed to the Commission's jurisdiction and, by the same token, would pre-empt space in pipelines that might otherwise be used for transportation of gas for superior uses. The second may be called the "price" consideration and involves the Commission's fear that this sale—which was executed at a price higher than the maximum fixed by the Commission in the producing districts here involved—would increase the price of natural gas in the field, thus triggering a rise in the price provisions in other contracts.

In light of what this Court has said on prior occasion concerning the term "public convenience and necessity" in analogous statutes, the ready inference is that the Commission has the power to consider the "end use" and "price" factors. For example, in *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236, 241, the Court concluded that:

> "The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. *Interstate Commerce Commission* v.

Parker, 326 U. S. 60. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies. Its doubt that the public interest will be adequately served if resumption of service is left to existing carriers is entitled to the same respect as its expert judgment on other complicated transportation problems . . . ." See *Interstate Commerce Comm'n* v. *Railway Labor Executives Assn.*, 315 U. S. 373, 376–377.

In fact, in interpreting this very section, we said that "'§ 7(e) requires the Commission to evaluate *all* factors bearing on the public interest." *Atlantic Refining Co.* v. *Public Utilities Comm'n*, (CATCO), 360 U. S. 378, 391. (Emphasis added.) However, respondents correctly point out that Congress, in enacting the Natural Gas Act, did not give the Commission comprehensive powers over every incident of gas production, transportation and sale. Rather, Congress was "meticulous" only to invest the Commission with authority over certain aspects of this field, leaving the residue for state regulation. *Panhandle Eastern Pipeline Co.* v. *Public Service Comm'n*, 332 U. S. 507. Therefore, it is necessary to consider with care whether, despite the accepted meaning of the term "public convenience and necessity," the Commission has tread on forbidden ground in making its decision.

End use. No one disputes that natural gas is a wasting resource and that the necessity for conserving it is paramount.[3] As we see it, the question in this case is whether the Commission, through its certification power, may pre-

[3] See F. P. C., Natural Gas Investigation (1948), Docket G-580, Olds-Draper Report, pp. 6–14.

vent the waste of gas committed to its jurisdiction. One apparent method of preventing waste of gas is to limit the uses to which it may be put, uses for which another, more abundant fuel may serve equally well. Thus the Commission in this case, as it often has in the past,[4] has declared that the use of gas under industrial boilers is an "inferior" use, the assumption being that other fuels, particularly coal, are an adequate substitute[5] in areas where such other fuels abound. However, respondents, while conceding the premise that gas may be wasted where coal is readily available, argue that Congress has not awarded the Commission *any* powers over conservation; rather, this authority has been reserved to the States. This contention is based on the legislative history of the Natural Gas Act.

When Congress initially enacted the Natural Gas Act in 1938, all the indications were that Congress intended the States to be the primary arbiters of conservation problems. The 1938 Act was based on a 1936 report rendered by the Federal Trade Commission[6] and the section in that report devoted to conservation stresses the powers of state bodies to adopt corrective measures. The final recommendation of the Federal Trade Commission in regard to conservation contemplated primary state authority, with federal agencies being relegated to a reporting function.

[4] The cases in which the Commission has considered the end-use factor are collected in the Court of Appeals' opinion. 271 F. 2d, at 949, n. 27.

[5] The Commission's long-standing conclusion that the use of gas under industrial boilers is an inferior use is amply supported by authority. See, *e. g.*, Blachly and Oatman, Natural Gas and the Public Interest, 142.

[6] Federal Trade Commission, Final Report to the Senate of the United States, S. Doc. No. 92, 70th Cong., 1st Sess., Part 84-A. Section 1 (a) of the Act, 15 U. S. C. § 717 (a), refers explicitly to this report.

This recommendation formed the basis for § 11 of the Act as ultimately passed and that section reveals a secondary role for the Commission in this regard.[7]

However, in 1940, the Commission reported its dissatisfaction with the limited scope of § 7. The 1938 version of § 7 restricted the Commission's jurisdiction to certification of transportation into areas where the market was already being served by another natural gas company; if

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[7] Section 11 of the Act, 13 U. S. C. § 717j, provides:

"(a) In case two or more States propose to the Congress compacts dealing with the conservation, production, transportation, or distribution of natural gas it shall be the duty of the Commission to assemble pertinent information relative to the matters covered in any such proposed compact, to make public and to report to the Congress information so obtained, together with such recommendations for further legislation as may appear to be appropriate or necessary to carry out the purposes of such proposed compact and to aid in the conservation of natural-gas resources within the United States and in the orderly, equitable, and economic production, transportation, and distribution of natural gas.

"(b) It shall be the duty of the Commission to assemble and keep current pertinent information relative to the effect and operation of any compact between two or more States heretofore or hereafter approved by the Congress, to make such information public, and to report to the Congress, from time to time, the information so obtained, together with such recommendations as may appear to be appropriate or necessary to promote the purposes of such compact.

"(c) In carrying out the purposes of this chapter, the Commission shall, so far as practicable, avail itself of the services, records, reports, and information of the executive departments and other agencies of the Government, and the President may, from time to time, direct that such services and facilities be made available to the Commission."

Other indications that Congress initially contemplated state control over conservation are found in the remarks of Congressman Mapes, a member of the committee reporting the bill that became the Natural Gas Act, 81 Cong. Rec. 6726, and Col. Chantland, counsel representing the Federal Trade Commission before Congress, Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 11662, 74th Cong., 2d Sess. 66-67.

a pipeline wished to extend service into virgin territory, the Commission had no power to act. The Commission felt that this limitation barred it from considering "the broad social and economic effect of the use of various fuels" in a § 7 proceeding. *Kansas Pipe Line & Gas Co.*, 2 F. P. C. 29, and, in its 1940 Annual Report, the Commission urged that the restriction be deleted in order that conservation considerations might be weighed. The language used by the Commission is particularly relevant to this case:

> "The Natural Gas Act as presently drafted does not enable the Commission to treat fully the serious implications of such a problem. The question should be raised as to whether the proposed use of natural gas would not result in displacing a less valuable fuel and create hardships in the industry already supplying the market, while at the same time rapidly depleting the country's natural-gas reserves. Although, for a period of perhaps 20 years, the natural gas could be so priced as to appear to offer an apparent saving in fuel costs, this would mean simply that social costs which must eventually be paid had been ignored.
>
> "Careful study of the entire problem may lead to the conclusion that use of natural gas should be restricted by functions rather than by areas. Thus, it is especially adapted to space and water heating in urban homes and other buildings and to the various industrial heat processes which require concentration of heat, flexibility of control, and uniformity of results. Industrial uses to which it appears particularly adapted include the treating and annealing of metals, the operation of kilns in the ceramic, cement, and lime industries, the manufacture of glass in its various forms, and use as a raw material in the chemical industry. General use of natural gas under

boilers for the production of steam is, however, under most circumstances of very questionable social economy." 20 F. P. C. Ann. Rep. 79 (1940).

The Commission implemented its recommendation by submitting to Congress a proposed amendment to § 7, with the restrictive language eliminated, and an amendment substantially similar to the one drafted by the Commission was enacted in 1942.[8] During the course of the

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[8] Section 7 (c) of the Act, as originally enacted in 1938, provided, in part, that:

"(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof. . . ." 52 Stat. 825.

The Commission's proposed amendment was first introduced as H. R. 4819, 87 Cong. Rec. 4301, and later resubmitted as H. R. 5249. The bill, as proposed by the Commission, insofar as here pertinent read:

"No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations. . . ." Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5249, 77th Cong., 1st Sess. 1.

This section, as finally enacted, reads:

"(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate

hearings on the amendment, the Commission reiterated the position it had taken in its 1940 report. Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5249, 77th Cong., 1st Sess. 82, and the language used by the Committees reporting the bill indicate that the amendment was framed in response to the Commission's complaint. H. R. Rep. No. 1290, 77th Cong., 1st Sess. 3; S. Rep. No. 948, 77th Cong., 2d Sess. 1-2.

It is true, of course, that the Committee reports do not set out the Commission's position *in haec verba*. For example, the pertinent language of the House Committee Report states that:

> "The bill, as amended, eliminates the objections to the present section 7 (c) above mentioned. By this legislation, the present jurisdictional disputes are eliminated, and the door is opened to the consideration by the Commission of the effect of construction and extensions upon the interests of producers of competing fuels and competitive transportation interests. This result is accomplished, moreover, without undue disturbance of existing operating arrangements of natural-gas companies."[9] H. R. Rep. No. 1290, *supra*.

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any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations. . . ."

[9] S. Rep. No. 948 states that:

"The bill (H. R. 5249) would require a certificate from the Federal Power Commission to engage in the transportation or sale of natural gas or the construction, extension, or operation of natural-gas facilities subject to the jurisdiction of the Federal Power Commission. At the present time the Natural Gas Act requires a certificate of public convenience only for the extension of construction or extension of service 'to a market in which natural gas is already

Consequently, respondents argue that Congress only authorized the Commission to look at one side of the coin—the health of the coal industry—because that is the only point mentioned explicitly. However, this contention does not take adequate account of the position the Commission had consistently pressed upon Congress both prior to and during the hearings on the amendment—that the use of gas for purposes adequately served by other fuels was undesirable not only because it injured the competing industry but, what is more important because it was wasteful to use a fuel in short supply in place of an abundant fuel. See 20 F. P. C. Ann. Rep. 79 (1940). The history of the amendment reveals no voice raised in opposition to the Commission's position and there is no other indication that Congress was unwilling to give the chief proponent of the amendment anything less than it sought. Thus, it would be curious were we to infer such an intent from the language of the House Committee Report quoted above. Rather, we think it plain the Congress acquiesced in the Commission's position and

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being served by another natural-gas company.' The terms of this limitation are not defined by the act. Long preliminary investigations are required to determine whether or not the Federal Power Commission has jurisdiction to grant or to deny a certificate. Too, the Commission has held in the case of an extension by a gas company to a market already served by a competing company that the views or interests of competing fuel companies cannot be considered.

"Provisions of the Natural Gas Act empower the Commission to prevent uneconomic extensions and waste, but it can so regulate such powers only when the extension is to 'a market in which natural gas is already being served by another natural-gas company.' Thus the possibilities of waste, uneconomic and uncontrolled extensions are multiple and tremendous. The present bill would correct this glaring inadequacy of the act. It would also authorize the Commission to examine costs, finances, necessity, feasibility, and adequacy of proposed services. The characteristics of their rate structure could be studied. Obviously these are powers that Federal Power Commission should have and should exercise in the public interest."

the excerpted language signifies acquiescence. It should be noted that this is not the first time this Court has addressed itself to the effect of the 1942 amendment to § 7. See *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U. S. 591, 617, n. 30, and *Federal Power Comm'n v. East Ohio Gas Co.*, 338 U. S. 464, 468–469. And, while it must be conceded that the language pertinent here was not necessary to the decision in either *Hope* or *East Ohio*, the clear conclusion of the Court in those cases is directly opposed to respondents' present argument.

Respondents, however, vigorously contend that, subsequent to the 1942 amendment, the Commission itself has made statements on occasion which are inconsistent with the Commission's position in this case. In particular, respondents point to an excerpt from the Commission's 1944 Report to Congress, entitled The First Five Years Under the Natural Gas Act, where the Commission stated:

> "In its hearings on certificate cases, under section 7 (c) of the act, as amended, the Commission has freely permitted the intervention of representatives of coal, railroad, labor, and other interests concerned with the production or transportation of competing fuels. These interests have presented extensive evidence on the economic, sociological, and technological aspects of fuel competition, and their representatives have strongly urged the Commission either to deny certificates on the general grounds of conservation or to attach restrictions which would severely limit the uses for which natural gas might be sold.
>
> "It has been the unanimous view of the Commission that, inasmuch as the Congress had not given it comprehensive powers to deal with the end uses for which natural gas is consumed, and had granted the Commission no authority to regulate rates for the direct sales of natural gas to industry, it was the duty

of the Commission not to seek to exercise such authority until the Congress amended the Natural Gas Act to confer on the Commission such specific powers as Congress desired it to exercise." F. P. C., The First Five Years Under the Natural Gas Act 15.

This statement was relied on heavily by the Court of Appeals and it would be idle to contend that the report is irrelevant to the present inquiry. However, it is necessary to note the precise limit of the Commission's admissions. The Commission said that it had not been given "comprehensive" authority to deal with "the end uses for which natural gas is consumed" and that it would not deny certification on that ground alone.[10] The Com-

[10] The passage excerpted and relied upon by the Court of Appeals should be read with reference to the footnote appended thereto. In this footnote, the Commission stated:

"In its Opinion No. 93-A, which accompanied its order of September 24, 1943, issuing a certificate of public convenience and necessity to Tennessee Gas & Transmission Co. for the construction and operation of a natural-gas pipeline from Texas to West Virginia, the commission stated:

" 'Interveners representing coal operators, labor unions, and railroads, having a vital stake in the coal industry in the Appalachian area, oppose the granting of a certificate for the construction of applicant's proposed natural-gas pipe line principally on the ground that the present and future fuel needs of that area can be adequately met by coal. It is contended that the use of natural gas for industrial and space-heating purposes constitutes a dissipation of the natural-gas resources, and threatens the coal industry with ruinous competition. Considerable evidence was adduced by these interveners for the purpose of supporting such contentions.

" 'We recognize the force of these arguments and are not unmindful of the economic and social aspects of the problem posed by these interveners. We are not authorized, however, to regulate rates for natural gas sold directly to industrial consumers, which class of gas sales furnishes the keenest competition to the coal industry. Nor does our power to suspend rates extend to indirect sales of natural gas for industrial purposes. It appears, therefore, that the Natural Gas

mission did *not* say that it had no authority over the use to which certificated gas might be put nor did it say that end use was a factor beyond its power of notice. In view of contemporaneous statements by the Commission which would be inconsistent with the reading respondents press upon us,[11] we think that the 1944 report should be construed as admitting only a lack of comprehensive power to formulate a flat rule against direct sales for use under industrial boilers.

In this connection, it must be realized that the Commission's powers under § 7 are, by definition, limited. See Koplin, Conservation and Allocation: The Natural Gas Allocation Policy of the Federal Power Commission, 64 Yale L. J. 840, 862. The Commission cannot order a natural gas company to sell gas to users that it favors; [12] it can only exercise a veto power over proposed transportation and it can only do this when a balance of *all* the circumstances weighs against certification. Moreover, the Commission has no authority over intrastate sales under any section of the Act and, since a large percentage of the gas sold for so-called "inferior" uses is sold within the producing States,[13] this restriction further curtails the

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Act does not vest this Commission with *complete and comprehensive authority* which would permit us to act as arbiter over the end uses of natural gas.' " F. P. C., The First Five Years Under the Natural Gas Act 15, n. 14. (Emphasis added.)

[11] See the Commission's statement reproduced in S. Rep. No. 1234, 78th Cong., 2d Sess. 5-6. The Senate Committee itself recognized that, following the 1942 amendment to the Act, the Commission was directly concerned with conservation problems. *Id.*, at 1-2.

[12] Under § 7 (a) of the Act, 15 U. S. C. § 717f (a), the Commission has authority to compel extensions, though not enlargements, of a natural gas company's transportation facilities unless "to do so would impair its ability to render adequate service to its customers."

[13] See Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 79, H. R. 1758, and H. R. 982, 81st Cong., 1st Sess. 165.

Commission's power over conservation. In light of this, the Commission's position since the 1942 amendment is both consistent and rational. On the one hand, the Commission has stated that it does have power to consider end use in a § 7 proceeding. On the other hand, the Commission has sought, but has not been awarded, comprehensive authority over all aspects of gas conservation. A most striking example of the Commission's thinking is revealed by its reasons for *opposition* to H. R. 982, a bill proposed in 1949 which would have declared that:

> ". . . the public interest requires the establishment of, and adherence to, a policy with respect to the transportation of natural gas and the sale thereof in interstate commerce, which will—
>
> "(1) promote and safeguard, so far as possible, the national defense;
>
> "(2) conserve the reserves of natural gas for utilization which affords the highest social benefits to the public, consistent with reasonable rates and adequate service."[14]

The Commission argued against passage on, among others, the following ground:

> "The 10 point-policy would—
>
> "(2) Conserve the reserves of natural gas for utilization which affords the highest social benefits to the public, consistent with reasonable rates and adequate service;
>
> "This, of course, proposes a limitation on the purposes for which gas may be utilized. In order to be fully effective it would be necessary to extend the Commission's jurisdiction to intrastate sales because the great bulk of gas sold for so-called inferior indus-

[14] *Id.*, at 3.

trial uses is either sold in the field or by distributing companies over which the Commission does not have jurisdiction. The Commission, however, is aware of the problem and in certificate cases it does give consideration to the proposed uses of the gas in question. The Commission believes that, under the present act, it may give proper consideration to this matter in certificate proceedings." [15]

In light of this language, it is clear that the Commission fully realizes the distinction between the power it enjoys under § 7 and complete allocation power.[16] And we feel that this distinction entirely disposes of those contentions of respondents based on the Commission's purported ambivalent behavior.

There is a broader principle here which also stands in opposition to respondents' contentions. When Congress enacted the Natural Gas Act, it was motivated by a desire "to protect consumers against exploitation at the hands of natural gas companies." *Sunray Mid-Continent Oil Co.* v. *Federal Power Comm'n*, 364 U. S. 137, 147. To that end, Congress "meant to enact a comprehensive and effective regulatory scheme." *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm'n*, 332 U. S. 507, 520. See *Public Utilities Comm'n* v. *United Fuel Gas Co.*, 317 U. S. 456, 467. It is true, of course, that Congress did not desire comprehensive *federal* regulation; much authority was reserved for the States. But, it is equally clear that Congress did not desire that an important aspect of this field

[15] *Id.*, at 165.

[16] During the course of hearings held in 1947 on proposed amendments to the Natural Gas Act, Commissioner Smith summed up the position of the Commission and explained the language used in the 1944 report along substantially the same lines as we have pursued. Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 2185, H. R. 2235, H. R. 2292, H. R. 2569, and H. R. 2956, 80th Cong., 1st Sess. 685–686.

be left unregulated. See *Panhandle Eastern Pipe Line Co. v. Federal Power Comm'n, supra.* Therefore, when a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority we are not inclined to approach the problem negatively, thus raising the possibility that a "no man's land" will be created. Compare *Guss v. Utah Labor Board*, 353 U. S. 1. That is to say, in a borderline case where congressional authority is not explicit we must ask whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs.

In this case, the dispute is over the "economic" waste of gas which has been committed to transportation in interstate commerce outside the producing State. The Commission has not attempted to exert its influence over such "physically" wasteful practices as improper well spacing and the flaring of unused gas which result in the entire loss of gas and are properly of concern to the producing State; nor has the Commission attempted to regulate the "economic" aspects of gas used within the producing State. Respondents contend that, even in this posture, the Commission has usurped the functions of state regulating bodies but we cannot agree.

In the 1936 Federal Trade Commission Report, upon which respondents so heavily rely, there was some mention of control of the end use of gas and, as we have said, this report was strongly oriented towards state regulation. However, as the Court of Appeals pointed out, the primary emphasis was on physical waste of gas within the producing State and the reference to end use probably contemplated the use of gas in gasoline extraction and the manufacture of carbon black. 271 F. 2d, at 947. There is no indication that the Federal Trade Commission or Congress was thinking in terms of state-controlled

"economic" conservation of gas committed to interstate commerce. Moreover, it is questionable whether any State could be expected to take the initiative in enforcing this type of "economic" conservation. A producing State might wish to prolong its gas reserves for as long as possible but producing States have no control over the use to which gas is put in another State. See *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157; *Pennsylvania* v. *West Virginia*, 262 U. S. 533; *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U. S. 299. Consuming States may control the end use of gas, *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Comm'n*, 341 U. S. 329, but the deficiencies of this system in the present context are apparent—unless all States cooperate in enforcing a common regulation, the producer may pick a State which is sufficiently anxious for this scarce resource that it will take gas irrespective of the use.[17] Therefore,

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[17] The helplessness of a consuming State in this regard is dramatically illustrated by the opinion of the New York Public Service Commission in *In re Cabot Gas Corp.*, 16 P. U. R. (NS) 443 (1936). The language used by the Chairman of the Commission is particularly relevant in this context:

"There can be but one opinion among those who believe in the conservation of natural resources. They should be developed not to benefit a few individuals but in the interests of public welfare present and future. Our natural gas resources ought to be conserved and there is probably no field where the Federal government acting in the interests of the entire country and to protect the welfare of the future could accomplish more than in the natural gas industry. From a conservation viewpoint, I thoroughly agree with Commissioner Burritt, and if I could see how a denial of the present petition would work to this end, I would vote to refuse the application; but will such denial produce the desired results?

"The field from which gas is to be taken by the petitioner is in northern Pennsylvania and southern New York. Apparently far more of the gas will come from Pennsylvania than from New York and over the extraction of gas in the state of Pennsylvania, this

it appears that, consistent with the congressional purpose of leaving no "attractive gap" in regulation, we must conclude that the "end-use" factor was properly of concern to the Commission.

Price. As we read the opinion, the Commission's second objection to certification was based on its forecast that

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Commission has practically no control. It is possible for Pennsylvania companies to take all of the gas from this field unless the New York companies remove the gas before the field is exhausted.

"Further, the Public Service Commission has been given no adequate authority to determine how the natural gas resources of this state, to say nothing of the resources of Pennsylvania, shall be developed. We have no powers directly to control the amount of gas that is taken from any field and our indirect powers are so limited that it is doubtful if much could be accomplished. The state of New York receives far more gas from sources located beyond its boundaries than it exports to any adjoining state and the conservation of natural gas resources in the various states cannot be properly brought about except through voluntary action of the states or by the Federal government. Neither one is yet operative and while attention has been given to electric interstate commerce, no effective steps have been taken to conserve or regulate the distribution of natural gas, where it is so urgently needed.

"In view of the lack of authority conferred upon this Commission to conserve natural resources, the question becomes primarily what will be gained to consumers in the state of New York if the petition is denied. It is stated that about 80 or 90 per cent of the gas furnished by the petitioner will be used for industrial purposes and that only from 10 to 20 per cent will go to the general public, the inference being that the saving to the companies purchasing the gas will go to enrich a few stockholders. Let us assume such are the facts. Who will gain if those benefited by the petition are deprived of their profits or advantages by a denial of the petition? This Commission does not control the use that will be made of the gas from the field tapped by the petitioner. There are many other companies tapping the supply and we have no means of determining where, when, or to whom the gas will be sold. If restriction is imposed on the use of it in New York, it may go to Pennsylvania; and if the petitioner is not allowed to supply the areas which it is proposed to serve,

this and similar direct sales of gas at unregulated prices higher than those allowed in sales for resale [18] would attract gas to the high-bidding direct purchasers and thus lever upwards field prices both in direct sales and sales for resale.

Respondents claim that this "policy" consideration masks the Commission's true purpose in this proceeding, which, according to respondents, is to bar direct sales absolutely, thus forcing all gas transactions into regulated channels. And respondents argue that such an absolute bar runs contrary to the intent of Congress as expressed in § 1 (b) of the Natural Gas Act quoted *supra*, the section which limits the FPC's jurisdiction to sales *for resale* in interstate commerce.

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the gas will go to other areas and there is no assurance that it will be used any more beneficially from a public viewpoint than it will be if the petition is granted.

"As stated, I am heartily in favor of the conservation of natural gas as well as other natural resources; but in this specific case, will the granting or the denial of the petition work to the benefit of the people of New York? The benefit to the area to be supplied by the petitioner is definite, it is known, it is sure. But if the petition is denied, who will be benefited? There is no assurance upon this point. The answer is speculative and uncertain. There is nothing to assure us that the denial of the petition would conserve the gas supply. Is it not likely that the benefits would merely be diverted from one group or one locality to another?"

It might be argued that this attitude is out of date since the Commissioner was speaking prior to the enactment of § 11 of the Natural Gas Act. See note 7, *supra*. However, the success of § 11 can be measured by examination of the Olds-Draper Report, note 3, *supra*, at pp. 75–78.

[18] The Commission has recently set field prices for sales for resale in the area where this gas was bought at 18 cents per Mcf. See 25 Fed. Reg. 9578. The sales price to Con. Ed. in this direct sale was 1¼ cents per Mcf. over the line at which the Commission is trying to hold field prices. Any reading of the Commission's opinion which does not keep this fact in mind is, we believe, bound to be incomplete.

Were respondents correct in their interpretation of the Commission's action in this case, we would be forced to agree that the Commission had overstepped its bounds. Certainly such action would be contrary to our previous statements that the term "public convenience and necessity" connotes a flexible balancing process, in the course of which all the factors are weighed prior to final determination. *United States* v. *Detroit & Cleveland Navigation Co., supra.*[19] Indeed, as respondents argue, such a flat rule would be doubly objectionable here because Congress has not given the Commission jurisdiction over direct sales. However, we cannot agree that the Commission propounded an absolute rule in this case. Examination of the opinion reveals recurrent reference to the absence of any one controlling factor; as the Commission stated, "countervailing factors suffice to *tip the balance* against the grant of authority requested by Transco." 21 F. P. C., at 141. (Emphasis added.) It is difficult to find any indication of the flat rule mentioned by respondents in language such as this. Furthermore, if there were any lingering doubt on this point, it is dispelled by the fact that the Commission has, on many occasions, held that transportation of gas sold directly to the consumer *is* in the public interest when the reasons advanced by the applicant have been sufficiently strong. See, *e. g., Houston, Texas Gas & Oil Corp.*, 16 F. P. C. 118. On this point, the Commission's actions speak louder than respondents' unsupported allegations. See *Northern Natural Gas Co.*, 15 F. P. C. 1634.[20]

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[19] Compare the cases which have held that it was error for the Commission to refuse to consider certain factors within its power of notice. *E. g., City of Pittsburgh* v. *Federal Power Comm'n*, 237 F. 2d 741.

[20] Many of the cases in which the Commission has certificated the transportation of gas pursuant to direct sales are listed in Brief for

Respondents also argue that the Commission is opposed to this transaction merely because the underlying sale is a direct sale not subject to the Commission's primary jurisdiction. However, a fair reading of the Commission's opinion as a whole reveals that the Commission did not exalt form over substance in an attempt to aggrandize the scope of its jurisdiction; rather, whenever the Commission discussed the nonjurisdictional nature of this sale, it tied this discussion into an analysis of one or the other of the substantive evils it was seeking to prevent—"inferior" use or increased prices to consumers generally.[21]

The question for consideration in this section, therefore, is whether in a § 7 proceeding the Commission may

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Respondent Michigan Consolidated Gas Co. in Opposition to the Petition for Certiorari, pp. 24–30; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm'n*, No. 389, 1956 Term.

[21] The Court of Appeals agreed with respondents that certain language used by the Commission indicated that the Commission was *per se* opposed to direct sales. The Court concentrated on the passage in which the Commission stated that certification would have the adverse effect of:

"[M]aking it more difficult to meet the requirements of smaller purchasers in the event arrangements of this type become widespread." 21 F. P. C., at 399–400.

and it felt that this was tantamount to saying that:

"[O]nly pipe lines should purchase gas for only they engage in interstate transportation and thereby come under authority of the Commission." 271 F. 2d, at 953.

However, the thrust of the Commission's reasoning on this point can be better grasped by reviewing the proposition as it was argued to the Commission by its staff. The Commission's staff contended that:

"The purchase of natural gas by and transportation for the ultimate consumer, as proposed herein, may make it difficult for pipe line companies to purchase gas at *reasonable prices* for resale to other customers who require the gas for *superior domestic and commercial uses* and thus may be contrary to the public interest." (Emphasis added.)

consider sales price or, more accurately, the effect the inflated price charged in one sale will have on future field prices. We have recently answered this question in favor of the Commission's jurisdiction. See *Atlantic Refining Co.* v. *Public Utilities Comm'n* (CATCO), *supra*, at 391, where we stated that the Commission could decide whether:

> "[T]he proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises. . . ."

However, respondents point out that the underlying sale in *CATCO* was a sale for resale and thus independently subject to the Commission's jurisdiction. Where such independent jurisdiction does not exist because of the bar in § 1 (b), respondents claim that the Commission's power of notice is curtailed.

This Court has never been faced with precisely this problem, but on several occasions we have been called upon to consider arguments very similar to the one advanced here. For example, in *Colorado Interstate Gas Co.* v. *Federal Power Comm'n*, 324 U. S. 581, it was held that, in fixing a rate base for the measurement of interstate wholesale rates, the Commission might take into account the value of the pipeline company's production and gathering facilities, even though the Commission had no direct jurisdiction over these facilities because of the bar in § 1 (b). The contention which was rejected in *Colorado Interstate* has a familiar ring in the present context: According to the unsuccessful litigant, when the FPC includes production and gathering facilities in a rate base, "it regulates the production and gathering of natural gas contrary to the provisions of § 1 (b) of the Act." *Id.*, at 600. Similarly, in *Panhandle Eastern Pipe Line*

Co. v. *Federal Power Comm'n*, 324 U. S. 635, 646, it was said in dictum that:

> "The Commission, while it lacks authority to fix rates for direct industrial sales, may take those rates into consideration when it fixes the rates for interstate wholesale sales which are subject to its jurisdiction."

These cases, while not in themselves controlling, indicate at least that respondents' argument is overly broad. However, to decide a particular case we must return to the consideration discussed in the previous section—the Act contemplates comprehensive regulation in the public interest and the critical inquiry is whether Congress intended state or federal authority to govern.

In the present case, the Commission was concerned with the effects this certification might have in the future on field prices generally. The Commission was attempting to consider not only the interests of consumers in New York but those in all States. To be compared with the problem before the Commission are the determinations that a consuming state commission may properly make in exercising authority over a direct sale. Certainly, the consuming State can regulate retail rates at which gas can be sold within the State. *E. g.*, *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n*, 332 U. S. 507. This power was recognized at the time the Act was passed, see Powell, Note, Physics and Law—Commerce in Gas and Electricity, 58 Harv. L. Rev. 1072, and it is clear that Congress excepted federal regulation of direct sales precisely for this reason. See H. R. Rep. No. 709, 75th Cong., 1st Sess. 1–2. But, in this case the Commission has not objected to the retail rate and we need not decide whether there are limits on the Commission's power in this hypothetical situation. The very nature of the

present problem, entailing as it does considerations that overstep the bounds of any one State, illustrates the improbability that state commissions could or would attempt to deal with it; it seems clear that considerations of this sort are uniquely fitted for federal scrutiny. Particularly relevant in this connection is this Court's decision in *Panhandle Eastern Pipe Line Co. v. Public Service Comm'n*, 332 U. S. 507. In that case, it was held that a state commission may regulate retail sales, even though the gas was brought from out-of-state sources. The pipeline company argued that conflicting regulations enforced by different state bodies, particularly regulations concerned with interruption of service, might place it in an untenable position. The Court answered this argument by stating that:

> "There is no evidence thus far of substantial conflict in either respect and we do not see that the probability of serious conflict is so strong as to outweigh the vital local interests to which we have referred requiring regulation by the states. *Moreover, if such conflict should develop, the matter of interrupting service is one largely related, as appellees say, to transportation and thus within the jurisdiction of the Federal Power Commission to control, in accommodation of any conflicting interests among various states.*" *Id.*, at 523. (Emphasis added.)

The point is, as we have stated, that Congress did not desire an "attractive gap" in its regulatory scheme; rather, Congress intended to impose a comprehensive regulatory system on the transportation, production, and sale of this valuable natural resource. Therefore, when we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions can be expected

to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation. See *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm'n*, 232 F. 2d 467.

Respondents' final argument on this point is that the Commission abused its discretion in denying certification because it took cognizance of facts *de hors* the record and because it did not pay sufficient attention to the recorded testimony of respondents' expert concerning air pollution. The first objection—that the Commission erred in going outside the record—was rejected by the Court of Appeals and we concur in that conclusion. According to the statute, the Commission is required to determine whether certification is in the "present or *future* public convenience and necessity." (Emphasis added.) Obedient to this command, the Commission did forecast the future and concluded that widespread direct sales at high prices would probably result in price increases. Respondents appear to be claiming that the Commission should have adduced testimonial and documentary evidence to the effect that this forecast would come true. However, we do not think that the Commission is so limited in its formulation of policy considerations. Rather, we think that a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency. See *Atlantic Refining Co.* v. *Public Service Comm'n* (CATCO), *supra*, at 391.[22] It should also be noted that there has been a considerable showing made by the petitioners and state regulatory commissions appearing as *amici curiae* to the effect that

[22] Cf. *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236, 241, where the Court upheld the Interstate Commerce Commission's forecast of the future public convenience and necessity over an objection that there was no absolute showing that the forecast would come true.

the Commission's forecast is well founded.[23] Moreover, as a matter of common sense, it would seem difficult to deny that the channeling of vast quantities of a wasting resource into unregulated transactions at a high price will result in scarcity to other consumers and a general price increase. Cf. *Panhandle Eastern Pipe Line Co.* v. *Public Utilities Comm'n*, 332 U. S. 507, 521, n. 19.

Respondents' last point is that insufficient weight was afforded the evidence concerning air pollution. Concededly, the testimony of Con. Ed.'s expert witness, the Commissioner of the Department of Air Pollution Control in New York City, was entitled to great weight. However, as the New York Commissioner himself admitted, it was not possible for him to establish a definite relation between injury to health and the stack emissions at the Waterside station.[24] More importantly, it was not shown that other methods—particularly the use of gas presently available to Con. Ed. under other forms of service[25]—

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[23] The *amicus* briefs of two California public utilities, Southern California Gas and Southern Counties Gas, reveal that the competitive bidding of California Edison Co., a large industrial user, for direct purchases in the field have already forced up the prices to domestic consumers in California. Brief Amici Curiae of the Southern California Gas Co. and the Southern Counties Gas Co. of California, pp. 13–14. Several other industrial users are also contemplating taking advantage of an X–20 type service. See Reply Brief for the Federal Power Commission, pp. 4–5. In fact, the record reveals that Transco has suggested the possibility of providing X–20 service to its other customers, Joint Appendix 71a, and several of these customers are negotiating for such service. Joint Appendix 63 (a)–71 (a). It is interesting to note that an Assistant to the Vice President of Con. Ed. testified that the producers sold the gas directly to Con. Ed. with a limitation on resale because "they (the producers) were allergic to proceedings before the Federal Power Commission." Joint Appendix 108a.

[24] Joint Appendix 48 (a), 111 (a).

[25] At the time certification for the X–20 service was sought, Con. Ed. was using gas on an interruptible basis at a rate that averaged

could not be used to solve the problem. Consequently, we cannot say that the Commission acted irrationally in concluding that Con. Ed.'s proof was insufficient. See *Charleston & Western Carolina R. Co.* v. *Federal Power Comm'n*, 234 F. 2d 62.

Neither this Court nor the Commission holds in this case that sales to pipelines are generally more in accord with the public interest than other sales; nor do we authorize the elimination of direct sales of gas under appropriate circumstances nor the denial of a certificate to any arbitrarily chosen group of purchasers. All we hold is that the Commission did not abuse its discretion in considering, among other factors, those of end-use, preemption of pipeline facilities and price in deciding that the public convenience and necessity did not require the issuance of the certificate requested. The judgment of the Court of Appeals must be

Reversed.

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out to 78,578 Mcf. per day. A substantial amount of this gas was fired under Con. Ed.'s boilers, although not under the boilers at the Waterside station. No reason appears in the record why Con. Ed. could not have used the gas it was then receiving under its Waterside boilers to alleviate, if not solve, the air pollution problem. See Joint Appendix 89a–92a.

SUPREME COURT OF THE UNITED STATES

Nos. 45 and 46.—October Term, 1960.

Federal Power Commission, 45 *v.* Transcontinental Gas Pipe Line Corp. National Coal Association, et al., 46 *v.* Transcontinental Gas Pipe Line Corp.	On Writs of Certiorari to the United States Court of Appeals for the Third Circuit.

[January 23, 1961.]

Mr. Justice Harlan, whom Mr. Justice Frankfurter and Mr. Justice Stewart join, concurring in part and dissenting in part.

The Commission's denial of a certificate for the transportation of this natural gas rested on a combination of three determinations: (1) the inferior "end use" of the gas, that is its use for the alleviation of air pollution resulting from the burning of coal in the Waterside Plant of Consolidated Edison in New York City; (2) the effect of purchases such as this in enhancing future field prices of natural gas; and (3) the likely pre-emption of future pipeline transportation capacity resulting from such purchases.

Though I regard the matter as less clear than the Court does, I agree that the legislative history of the 1942 amendments to the Natural Gas Act supports the Commission's power to consider inferior end use as a factor in denying Transco a transportation certificate for the gas in question. However, I cannot agree that the premises on which the Commission rested its conclusions as to field prices and the pre-emption of transportation capacity are adequate to justify affirmance of its denial of a certificate.

As will be shown those conclusions were bottomed almost entirely on the proposition that most, if not all, *direct* purchases, at least those of substantial magnitude, would be against the public interest. Since I believe that the denial of a certificate in this case had to be premised on factors present in *this particular* transaction, I think the proper course is to remand the case to the Commission for further consideration on proper postulates.

At the outset, it is important to note the procedural context of our review. In denying a petition for rehearing, the Commission made clear that the "end use" factor was neither of "decisive" nor of "determinative" importance; inferiority of end use was but one of several factors which together, and not individually, justified denial of this certificate in the Commission's view. These other factors failing, as they do in my opinion, the denial of the certificate cannot stand.

PREMISES OF THE COMMISSION'S DENIAL.

I think it manifest that the Commission weighed against certification the fact that the sale to Consolidated Edison was direct to a consumer and hence not subject to normal Commission regulation of sales to pipeline companies for resale.[1] The Trial Examiner referred to "the

[1] The basic reach of the Natural Gas Act, 15 U. S. C. § 717 *et seq.*, is set forth in § 1 (b), 15 U. S. C. § 717 (b):

"The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

Staff's opposition" as based, among other reasons, on the fact that:

> "The proposal is obviously an attempt to evade the jurisdiction of the Commission over the sale of natural gas for use in the large consuming centers of the country and thus may be contrary to the public interest; . . ."

And the Examiner referred to the Staff's argument "that this sort of non-jurisdictional activity by Consolidated Edison should be halted as an example to others who may similarly attempt to avoid regulation in this way." The same argument was repeated to the Commission itself.

That the Commission adopted this approach of viewing this particular sale as but a facet of the broader direct-sale problem is clear from the reasons it states, 21 F. P. C. 138, as weighing towards denial of the certificate. Each of the considerations of effect on field prices and distribution of field supply is worded in the plural. The Commission throughout its report speaks as if it is presently forbidding access to the producer in the field by any one except pipelines purchasing for resale. That it is not restricting itself to the denial of the particular transportation involved in the X–20 service but is instead only denying that service because of the adverse effects that would result from committing itself to regularly allowing direct purchases in the field by nonpipelines, is apparent from the following:

> "'[I]f we were to grant this request we would soon be confronted with many requests of the same general character . . . .
>
> "How much more serious is that impact [of large demand on limited supply] when it is in the form of multiple bidders . . . .
>
> "'And how long the pipeline can continue to buy in competition with nonjurisdictional, large volume purchasers . . . is at least a question." *Id.*, p. 141.

In its denial of a rehearing [2] the Commission acknowledged that it considered the "adverse effects on the public" of granting this "and similar authorizations" including "the effect of stimulating increased purchases of gas in the field by distributing companies in substitution for the present, prevalent types of interstate natural-gas services involving purchases and resales by natural-gas pipeline companies . . . ." *Id.*, p. 399.[3]

It is clear, then, that the Commission was concerned with the adverse effects it felt characterized most sales to distributing companies or consumers, rather than with anything offensive about this particular sale (excepting of course the proposed end use). What were these adverse effects of all direct sales? Two are central to the

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[2] 21 F. P. C. 399.

[3] If there can be any doubt on this score, it is dissipated by the position taken by the Commission in the "Summary of Argument" in its brief in this Court:

"The threat posed by the X-20 type of arrangement to the small consumer, the person for whom the protections of the Natural Gas Act were designed, lies in its potential to establish a new, unregulated, interstate market for natural gas—by the large industrial consumer purchasing directly from the producer—which will compete for new gas supplies with the regulated market over which the Commission currently exercises jurisdiction. . . .

"In the Commission's view, the new market which this and further X-20 transactions would establish (1) portends definite and lasting inflationary impact on gas prices generally, (2) would probably be devoted to end-uses inappropriate to the Act's purposes, (3) would disrupt patterns of industry growth carefully evolved during 20 years of congressionally-directed regulation, and (4) would be beyond effective state regulation.

"On the basis of its judgment that these damaging probable effects outweighed both (1) Con Edison's need for the gas, and (2) the inadequately shown contribution which burning the gas as boiler fuel might make to local air pollution control, the Commission denied Transco's application for a certificate as not being required by the present or future public convenience and necessity."

Commission's opinion. First, "the authorization of this and like proposals would pre-empt for this usage capacity which would otherwise be available to meet more urgent and widely beneficial public needs . . . ." 21 F. P. C., at 141.[4] Second, there is the effect on field prices:

> "The impact of large demand on relatively limited supply is certain enough to raise rates and field prices if only one bidder is bringing that demand to bear on the supply. How much more serious is that impact when it is in the form of multiple bidders, each attempting to reserve to itself a firm supply. Inevitably, there would be upward pressure on rate levels in the fields. We do not believe we ought to encourage such when it is unnecessary. . . ." *Ibid.*

Thus, the Commission has quite evidently asserted a power to frown upon any transaction which does not take the form of a sale to a pipeline for resale. On that basis, it was in this case, and would hereafter be, unnecessary for the Commission to decide whether a particular sale to a consumer or distributing company results in a waste of jurisdictional resources or an unwarranted boosting of field prices. Since, in the Commission's view, sales not to pipelines, as a class, generally have these unfortunate characteristics, it is sufficient that the particular transaction is one of that class. The Commission has made clear that it was the harms inherent in the form this sale took that weighed against the issuance of a transportation certificate, not the unfortunate effects of the transaction itself. I cannot agree that the Commission had discretion to adopt this position when it had available to it far less drastic alternatives.

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[4] I agree with the Third Circuit that this consideration ultimately depends upon the inferiority of the proposed "end use," only now the end use is to be considered in the context of limited pipeline capacity rather than limited supply of gas.

II.

Postulates on Which the Commission Should Have Proceeded.

Without purporting to exhaust the full reach of its discretion, the premises on which the Commission, in my view, should have proceeded will be now indicated. Basically, I think it was open to the Commission to decide whether the particular transportation service before it would tend to waste gas, unduly pre-empt pipeline capacity, or raise field prices. I think the Commission can properly assert this more limited power as an incident of its transportation certificating powers.[3] It is quite true of course that Consolidated Edison need not have resorted to the Federal Power Commission if the purchase transaction had been possible without the interstate transportation of the gas in jurisdictional pipelines, since this was not a purchase of natural gas for resale. Note 1, *supra*. However, it does not follow that the Commission had to blind itself to the effects of the purchase and use of the gas when its authority to certificate the transportation of the gas was invoked. To recognize that the transaction was, as a practical matter, impossible without the use of jurisdictional facilities for the interstate trans-

[3] Section 7 (e), 15 U. S. C. § 717 (f), provides:

"(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. . . ."

portation of the purchased gas is to acknowledge that this transportation is as integral a part of the transaction as was the sale itself. Whether the adverse effect of the transaction be a waste of a scarce resource, or pre-emption of pipeline capacity, or a substantial boosting of field prices, the transportation is as responsible for the effects as is the original sale. I see no reason why the Commission must certify, as in accord with the "public convenience and necessity," transportation which tends materially to further such undesirable results which are within the area of the Commission's legitimate concern when it is considering the public convenience and necessity of certificating a jurisdictional sale.

Assuming that it is results only made possible by jurisdictional transportation that the Commission wishes to consider, an attempted distinction between transportation and sale certification proceedings simply obscures the important question: what undesirable results are envisioned by § 1 (b) to be the concern of the States and not the concern of the Federal Power Commission? We hold in this case that the economic waste of natural gas that might otherwise be available for jurisdictional transactions ending in superior uses is such a legitimate concern. Similar considerations pertain to the pre-emption of pipeline capacity. Note 4, *supra*. Finally, we have held in *Atlantic Refining Co.* v. *Public Service Comm'n*, 360 U. S. 379, that the Commission must consider the effect on field prices for future jurisdictional sales of an excessive purchase price. Asserting power to consider these effects does not involve assuming jurisdiction over matters that Congress has reserved to the States in § 1 (b), for it does not involve protecting citizens of either the producing or consuming State against harms that local regulatory bodies have the power to prevent. These effects being the legitimate concern of the Federal Power Commission, they are no less so in a certification proceeding for trans-

portation than in such a proceeding for the sale of natural gas. Each of these effects, if materially furthered by the transportation being considered, can properly be relied upon, on a case-by-case basis, in the denial of a transportation certificate.

III.

Deficiencies of the Commission's Report.

If, as I have argued, the Commission has power to decide on an adequate record to deny a transportation certificate in part because the gas to be transported is to be used for inferior purposes or because that gas was purchased at a price adversely affecting the prices of later jurisdictional sales, I do not think there is any basis for the Commission's further claim of authority to consider as an adverse factor the mere fact that the sale was direct to a consumer or distributor. As to inferior end use or pre-emption of pipeline capacity, the latter being another aspect of the former, the invalidity of the Commission's claim is easily established. Once the Commission has weighed against the grant of the certificate the fact that it results in economic waste there is nothing added by the circumstance that it is also a direct sale to a consumer and the Commission's belief that most of such sales result in economic waste.

The Commission's consideration of the impact on field prices is more refined, although no more solidly grounded. The Commission did not merely consider that the price of these sales would be unregulatable and argue that therefore all sales to consumers or distributors must be forbidden. So it is not a complete answer to repeat what has just been said about the Commission's consideration of inferior "end use" and pipeline pre-emption—that those factors can be fully considered on a case-by-case basis. The Commission passed beyond the possible problem of

unregulatable prices to an economic argument, namely, that increasing even the number of theoretically regulatable bidders for gas in the field must, as a practical matter, create a difficult-to-control-and-regulate upward pressure on field prices. I consider reasonable the economics of the Commission's position,[6] but unreasonable its finding of statutory authority for the Draconian solution it proposes.

In my opinion the Commission cannot attempt to protect its legitimate interest in lower field prices by denying sale or transportation certificates to any arbitrarily chosen group of purchasers. Such whimsy is not contemplated by the statute. Is there then a justifying basis for discriminating against purchasers other than pipelines purchasing for resale? It cannot be the fact that the use these purchasers propose is often inferior, for the Commission can consider this factor when the occasion arises. It cannot be the fact that the effect on field prices is worse, for prices paid by both pipelines and other purchasers can be considered by the Commission when passing upon the public interest either in a sale-for-resale or in a transportation certificate proceeding. I can find no justifying basis for the distinction sought to be drawn by the Commission between pipelines and others.

To the contrary, the discrimination against nonpipeline purchasers flouts the statutory structure by permitting

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[6] That a greater number of bidders representing the same total demand as a smaller number of bidders would exert greater upward pressure on prices is a basic hypothesis of the antitrust laws which therefore forbid buyers to group together in dealing with a seller. Just as competition is stifled and price affected by competing sellers agreeing to sell through a single agent (and therefore at a single price), price is also affected by similar action by competing buyers. The Commission conclusion on this subfactor needed no supporting evidence.

the Commission to exercise greater regulatory power over transactions with one nonjurisdictional aspect (the direct sale) than the Commission has over transactions of which both aspects (sale-for-resale and transportation) are jurisdictional. Moreover, to recognize the discrimination against direct sales that the Commission proposes in order to reduce the upward price pressure resulting from increased numbers of bidders, is to ignore the fact that the statute contemplates and provides regulation for the use of pipelines both as wholly transportation or carrier facilities. There is no indication that this "carrier" function of pipelines was to be limited to carrying for producers who would then sell in the State of destination. It also properly extends to carrying for and to wholesalers or consumers in the State of destination.[7]

These, then, in my opinion are the considerations which require a holding that it was an abuse of discretion for the Commission to hold sales to pipelines generally more in accord with the public interest than other sales. There is absolutely no rational basis, as I see it, for selecting distributing companies and consumers as the group of bidders to be sacrificed and eliminated in order to reduce the pressure toward higher field prices. There is no harmful characteristic of these bidders that is not fully shared by pipeline purchasers. Even worse, the purpose-

[7] Furthermore, viewing the matter realistically, the Commission must object as strenuously to a producer selling in the State of ultimate consumption as to a distributor or consumer buying in the State of production, for whether the direct sale between a producer and consumer takes place before or after the transportation of the gas is a matter easily manipulated by the parties and a matter which has no effect on the Commission's policy considerations. The upward pressure on field prices created by increasing the total number of bidders is the same whether the producer finds additional bidders in the consuming State or allows them to come to him in the field.

ful elimination of this entire class of prospective purchasers clashes with the structure of a statute that was largely motivated by a desire to reduce the power of the pipeline companies.

This conflict is most clearly manifested in the violence that the Commission's proposal does to the statute's provisions for regulation of a wholly carrier function of the pipelines, for a wholly carrier function can only be served on behalf of either producers which have already sold directly to nonpipelines or on behalf of nonpipelines which have already purchased directly from the producers. It is inescapable that forbidding all transactions involving direct sales between producers and nonpipelines eliminates any wholly carrier function for the pipelines, *i. e.*, eliminates one entire facet of the Commission's statutory jurisdiction. This statutory amputation—resulting in greater regulatory power over transactions with some nonjurisdictional aspects than there is over transactions all aspects of which are jurisdictional—is clearly outside the discretion of the Federal Power Commission.

Since the Commission regarded as necessary to its decision factors beyond its discretion to consider, the proceeding should be remanded to that agency for reconsideration. We cannot order the certificate granted, for there are results of this particular transportation which the Commission can and should properly consider but which were left unconsidered because of the erroneous broader grounds of the denial. On remand the Commission should not only consider and support with adequate fact findings the particular effects of *this* transaction on field prices and on Transco's future capacity to expand its pipeline services, but the way should be left open for it to give more careful consideration to the "end use" factor in its decision. I must say that its previous consideration of this aspect of the matter seems to me to leave much to be

desired, doubtless because of the over-all mistaken premises on which the Commission proceeded. In a reconsideration of the case upon correct premises, the air pollution problem may take on a different significance, and whatever conclusions the Commission may reach on this score should in any event be accompanied with more convincing particularized findings.

For the foregoing reasons I would vacate the judgment of the Court of Appeals and remand the case to the Commission for further proceedings.